DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS

NUMBER 15-97010 RTA

MOTOR CARRIER FUEL SURCHARGE TAX FOR THE PERIOD 1990 -- 96

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ISSUES

The Department would restate the single issue that the taxpayer raised as presenting the following issues:

I. Motor Carrier Fuel Surcharge Tax—"Commercial Motor Vehicle" Status—"Farm-Plated Vehicle" Exemption

Authority: 7 U.S.C. §§ 6932, 6962 (1994, corrected Supp. I 1995); 16 U.S.C. § 3801(a)(1) (1988 and 1994); 16 U.S.C. § 3821(b) (Supp. II 1990 and 1994); 16 U.S.C. § 3821(c) (Supp. III 1997); 16 U.S.C. § 3822(c) (1988); 16 U.S.C. § 3822(f)(1) (Supp. II 1990); 26 U.S.C. (I.R.C.) §§ 611(a) and 613(a) and (b)(6), 29 U.S.C. §§ 203(f) and 213(a)(6), 30 U.S.C. § 3, 33 U.S.C. § 1344 (1988 and 1994); IC §§ 6-2.5-5-5.1, 6-6-4.1-1(b), 6-6-4.1-4.5, 15-4-9-1, 15-7-1-2(a), 22-12-1-2, 22-12-1-4(c), 26-1-9-109(3) (1988 and 1993); IC § 6-3-1-17 (1988); IC § 22-3-2-9(a) (1988, 1993 and Supp. 1997); IC § 9-1-4-41(i) (Supp. 1990); IC § 6-6-4.1-2(b)(4) (Supps. 1990-91 and 1993); IC §§ 9-13-2-30, 9-29-5-13 (Supp. 1991 and 1993); IC § 6-3-1-11(b) (1993); *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 119 S.Ct. 1719 (U.S. 1999); *Farmers Reservoir & Irrigation Co. v. McComb*, 69 S.Ct. 1274 (U.S. 1949); *Michigan Peat Div. v. U.S. Envtl. Protection Agency*, 175 F.3d 422 (6th Cir. 1999); *McMurray v. Commissioner*, 985 F.2d 36 (1st Cir. 1993); *United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985); *A. Duda & Sons, Inc. v. United States*, 560 F.2d 669 (5th Cir. 1977); *Wirtz v. Ti Ti Peat Humus Co.*, 373 F.2d 209 (4th Cir. 1967); *United States v. Dierckman*, 41 F.Supp.2d 870 (S.D. Ind. 1998), *aff'd* 201 F.3d 915 (7th Cir. 2000); *Walling v. Georgia Peat Moss Co.*, 7 Lab. Cas. (CCH) ¶ 61,622 (M.D. Ga. 1943); *H.J. Heinz Co. v. Chavez*, 140 N.E.2d 500 (Ind. 1957); *Cypress Creek Coal Co. v. Boonville Mining Co.*, 142 N.E. 645 (Ind. 1924); *Evans v. Hardy*, 76 Ind. 527

(1881); *Owens v. Lewis*, 46 Ind. 488 (1874); *Lindley v. Kelly*, 42 Ind. 294 (1873); *Day v. Ryan*, 560 N.E.2d 77 (Ind. Ct. App. 1990); *Fleckles v. Hille*; 149 N.E. 915 (Ind. App. 1925); *Hanna v. Warren*, 133 N.E. 9 (Ind. App. 1921); *Hardin v. Vestal*, 162 S.W.2d 923 (Ark. 1942); *Craddock v. Riddlesbarger*, 2 Dana (32 Ky.) 205 (1834); *Dillenbeck v. State*, 83 N.Y.S.2d 308 (N.Y. Ct. Cl. 1948); *Davis v. Industrial Comm'n*, 206 P. 267 (Utah 1922); *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 959 P.2d 1024 (Wash. 1998); *Clarke v. Alstores Realty Corp.*, 527 P.2d 698 (Wash. Ct. App. 1974); 7 C.F.R. Part 12 (1987-2000); 26 C.F.R. (Treas. Reg.) §§ 1.611-1(d)(5) and 1.613-2(a)(1)(v) (1961-99); 29 CFR § 780.112 (1999); 36 C.F.R. § 228.41(c) (1991-99); U.S. Dep't of Labor, Standard Industrial Classification Manual, Industry Group 1499 (1987); 45 IAC § 13-2-2(5) and art. 13, Rule 8.5 (1988, 1992 and 1996); 1953 Op. Att'y Gen. No. 100, at 467

Did certain "farm-plated" motor vehicles of the taxpayer become "commercial motor vehicles" once the taxpayer began using them to transport raw peat, existing naturally on land that the taxpayer was farming, and that the taxpayer was extracting, selling and hauling over public highways to deliver to the buyer's off-farm place of business? To answer this question, the Department *sua sponte* raises the following sub-issues:

A. Was the taxpayer's hauling of peat in the farm-plated trucks an agricultural pursuit usual and normal to his farming operation?

B. If the answer to Sub-Issue I.A is "no," was the taxpayer operating those trucks in the conduct of a commercial enterprise?

II. Motor Carrier Fuel Surcharge Tax –Imposition—"Carrier" Status

Authority: IC § 6-6-4.1-1(a) and (b) (1988 and 1993); IC § 9-1-4-41(i) (Supp. 1990); IC § 9-29-5-13(c) (Supp. 1991 and 1993); 45 IAC § 13-2-2(5)(C) (1988, 1992 and 1996)

In light of the answer to Issue I, did the taxpayer become a "carrier" as to the peat hauling operation?

III. Motor Carrier Fuel Surcharge Tax—Imposition

Authority: IC § 6-6-4.1-4.5(a) (1988 and 1993)

If the answers to Issues I and II are "yes," was the consumption of the fuel by the "farm-plated" motor vehicles used in the taxpayer's peat hauling operation subject to motor carrier fuel surtax?

IV. Motor Carrier Fuel Surtax—Imposition—Estoppel Against /Waiver of Assessment

Authority: 45 IAC § 15-3-2(e) (1988, 1992 and 1996)

If the consumption was surtaxable, is the Department now barred from assessing that surtax by virtue of certain written and oral statements of other state agencies or their employees?

V. Penalties

Authority: IC § 6-6-4.1-23 (Supps. 1990-91 and 1993); IC § 6-8.1-10-2 (Supp. 1990); IC § 6-8.1-10-2.1 (Supp. 1991 and 1993); 45 IAC § 15-11-2(b) (1988, 1992 and 1996)

Does reasonable cause exist to waive the penalties the Department assessed?

STATEMENT OF FACTS

During the investigation period the taxpayer operated (and still operates) a farm, and as part of that operation also owned trucks for which the Indiana Bureau of Motor Vehicles had issued license plates as farm trucks. The farm is near a river bordered by a marsh. As a result of that marsh, there is a substantial amount of peat under the topsoil of the farm, which during the investigation period consisted of land that the taxpayer both owned and leased. The taxpayer stated that the peat under the farm occurred naturally. The taxpayer did not create the bog out of which it came and did nothing to expand that marsh until after extracting peat from under a given parcel of his farm, as the Department will describe below.

The taxpayer extracted or severed raw peat from under the topsoil on his farm during the investigation period and sold it to a company that owned a processing plant. The plant was and is located in a nearby Indiana town. He delivered the peat by hauling it over public highways in several of his "farm-plated" trucks, consuming tax-exempt dyed special fuel in the process. The delivery route was entirely within Indiana. All of the trucks used had a declared gross weight of twenty-six thousand pounds (26,000 lb.) or more.

Fuel excise tax authorities of the United States Treasury Department's Internal Revenue Service (hereafter "the IRS") became aware of the taxpayer's peat hauling activities and conducted a joint investigation with this Department of his resulting fuel tax liabilities. As a result of the Department's investigation, it issued Notices of Proposed Assessments of special fuel tax on the exempt-dyed special fuel that his farm trucks had consumed. The taxpayer protested the negligence penalty that the Department assessed for those liabilities, which the Department denied. However, the taxpayer did not protest the tax itself, and those liabilities therefore are not in issue in the present protest.

The Department also issued the present motor carrier fuel surtax Notices of Proposed Assessments. The taxpayer also timely protested these assessments; the Department gave written notice of a protest hearing setting and held that hearing, at which the taxpayer submitted the the evidence set out below.

The actual presence of peat under any given plot of the taxpayer's farmland was verified through soil tests. However, before beginning to remove peat, the taxpayer had to get prior approval from the federal agency having environmental jurisdiction over the land type in question. At least four times during the investigation period, the office of the U.S. Agriculture Department's former Soil Conservation Service (hereafter "the SCS") for the taxpayer's county used aerial photographs of various parcels of the taxpayer's farm to classify those parcels according to their wetland status. The classifications the SCS used included Wetlands (W), Farmed Wetlands

(FW), Minimal Effect Wetlands (MW) and Prior Converted Wetlands (PC), among others. The taxpayer stated at the hearing that the SCS would allow him to sever peat only from under plots it had identified as being MW or PC. The taxpayer also said at the hearing that persons wanting to extract peat from under lands classified as W or FW must get a permit to do so from the U.S. Army's Corps of Engineers. However, he represented that he engaged in no peat removal activities requiring such a permit during the investigation period.

The taxpayer severed the peat by disking and scraping up the layer of topsoil over it. He then dried the peat before hauling it to the local processing plant. All sales contracts between the parties were oral; the processing plant's representative advised the taxpayer yearly how much peat the plant would need. There is no evidence in the record of any stockpiling of raw peat on the farm, suggesting that it was extracted for sale on an "as needed" basis. After completing the extraction of the peat from under any given parcel of the farm, the taxpayer would plant sorghum on that parcel, in coordination with the Indiana Department of Natural Resources, in order to convert that parcel to wetlands and attract associated wildlife.

According to the taxpayer, peat's primary use, and the use for which he sold his peat to the local processing plant, is in horticulture or home gardening; however, the taxpayer said at the hearing that he did not and does not grow horticultural crops. He also said at the hearing that processed peat can't be used profitably in the cultivation of most agricultural crops. There is also no evidence in the record that severing the peat was necessary in order for the taxpayer to prepare his farmland, or to maintain and preserve its fitness, for growing crops or pasturing livestock.

The taxpayer did not claim the Internal Revenue Code's peat depletion allowance for any of the years investigated. The hearings officer asked one of the accountants that attended the hearing why the peat depletion allowance had not been taken. The accountant advised the hearings officer that one reason for not doing so was to avoid lowering the federal tax value (what the Internal Revenue Code calls the "basis") of the farmland that the taxpayer owned.

The taxpayer also stated that in the early 1990s he orally asked two employees of state agencies other than this Department about whether the taxpayer was required to pay fuel tax on the dyed fuel he was consuming in his peat hauling operation. The state employees with whom the taxpayer talked were an employee of the Department of Transportation and a member of the State Police stationed at a nearby post. The taxpayer represented to the hearings officer that each of these state employees orally advised him that he was not liable for fuel tax. The Department notes that the taxpayer also made these allegations during the earlier protest of the negligence penalty assessed against the taxpayer for failing to pay special fuel tax. However, the taxpayer has never submitted any documentary evidence of these opinions There is also no evidence that the taxpayer ever asked this Department to issue a letter ruling on whether the dyed fuel consumed was taxable.

I. Imposition of Motor Carrier Fuel Surcharge Tax--Commercial Motor Vehicle Status--"Farm-Plated Vehicle" Exemption

DISCUSSION

A. INTRODUCTION: HISTORICAL BACKGROUND AND ANALYTICAL FRAMEWORK

P.L. 59-1985, sec. 17, 1985 Ind. Acts 553, 566 created the motor carrier fuel surtax by adding IC § 6-6-4.1-4.5 to the Motor Carrier Fuel Tax Law, P.L. 59, sec. 1, 1982 Ind. Acts 523, 523-30, codified as amended at IC ch 6-6-4.1 (1988, 1993 and 1998). IC § 6-6-4.1-4.5(a), the imposition subsection, describes the money exaction as a "surcharge tax[,]" *id.*, and the Indiana Supreme Court accordingly named IC § 6-6-4.1-4.5 the Surcharge Tax Act in *Indiana Dep't of State Revenue v. Bulkmatic Transp. Co.*, 648 N.E.2d 1156, 1159 (Ind. 1995). The Department therefore will refer to the exaction at issue in this protest interchangeably as "the motor carrier fuel surcharge tax" or "the motor carrier fuel surtax," or more simply as "the surcharge tax" or "the surtax," since at this writing it is the only such listed tax.

As noted above, the Surcharge Tax Act was passed in 1985. The Department promulgated 45 IAC art. 13, Rule 8.5 (1988, 1992 and 1996), the implementing regulation, the following year. LSA Document # 85-107(f), sec. 14, 9 Ind. Reg. 2191, 2195 (1986). Neither IC § 6-6-4.1-4.5(a), Rule 8.5 nor certain terms to which they refer, defined in the Motor Carrier Fuel Tax Law and its implementing regulations and discussed below, have been amended since they respectively became effective. All of the foregoing provisions thus applied in their respective original forms throughout the years of 1990-96, which constitute the taxpayer's investigation period. Accordingly, unless otherwise noted, all further citations in this letter of findings to IC ch. 6-6-4.1 or to 45 IAC art. 13 refer to the editions of the Indiana Code and the Indiana Administrative Code that governed during that investigation period. Specifically, any further references to any provision of IC ch. 6-6-4.1 are to the 1988 and 1993 editions of the Indiana Code, while any further citations to any provision of 45 IAC art. 13 refer to the 1988, 1992 and 1996 editions of the Indiana Administrative Code, unless otherwise noted.

In discussing the foregoing authorities, and relevant federal statutes and regulations, at times it will be necessary for the Department to use dictionary definitions of certain words for which there is either no statutory, regulatory or judicial definition. Under such circumstances the meaning of a word in the Indiana Code is governed by IC § 1-1-4-1(1) (1988, 1993 and 1998). That subsection states in part that "[w]ords and phrases [used in the Indiana Code] shall be taken in their plain, or ordinary and usual, sense." "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, *contemporary*, common meaning." *Perrin v. United States*, 100 S.Ct. 311, 314 (U.S. 1979)(emphasis added). The ordinary, contemporary, common meaning of a non-technical word is the meaning found in English language dictionaries in existence at the time of the statute's enactment. *See id.* The Department's analysis of Indiana Tax Court opinions indicates that that court is most likely to refer to WEBSTER'S THIRD NEW INT'L DICTIONARY (hereafter "WEBSTER'S THIRD") in defining a non-technical word or phrase in a statute or regulation. The Indiana statutes and regulations at issue in this protest were enacted or promulgated between 1969 and 1991. WEBSTER'S THIRD has been in existence since 1961, when the first edition of that dictionary was published. Accordingly, where necessary in the following discussion

to give the contemporary definition of a non-technical word or phrase in the "farm plating" statutes and regulation, the Department, like the Tax Court, also will refer to WEBSTER'S THIRD, and in particular to the first edition of 1961, unless otherwise indicated. The Department will also refer to older dictionaries where needed to define agricultural, or agriculture-related, words in statutes that the General Assembly enacted before the "farm-plated" exemption, but of which it was presumed to have been aware in doing so.

B. TAXPAYER'S ARGUMENT

The taxpayer argues that raw peat is a "farm product" or "farm commodity" as 45 IAC § 13-2-2(5)(C) uses these terms. That letter quotes IC §§ 9-13-2-54 and 9-20-4-2(a) and (c) (1993) (P.L. 2-1991, secs. 1 and 8, 1991 Ind. Acts 191, 201 and 353, respectively). These statutes purport to define "farm commodities" for purposes of the maximum weight restriction for hauling such products. The taxpayer infers that the definition of "farm commodities" is non-restrictive from the use of the word "includes" in IC § 9-20-4-2(c) (1993), and that raw peat is therefore a farm commodity. To bolster this argument, the taxpayer cites to IOWA ADMIN. CODE § 761-400.47-(321), which defines peat as a "raw farm product" under that state's maximum road weight laws. *Id.*

Although the taxpayer has cited to a regulation of another state rather than to any Indiana legal authority, the Department agrees with the taxpayer that raw peat's legal status or lack of status as a farm product is relevant, as will be shown below. However, the taxpayer has cited the wrong authorities to support its argument, since maximum road weight restrictions on hauling farm commodities is not the issue. The issue is whether the peat-hauling motor vehicles were qualified to be "farm-plated," which in turn would make their fuel consumption exempt from surcharge tax . As the Department will show below, both IC § 6-6-4.1-2(b)(4) and 45 IAC § 13-2-2(b)(5)(A) require that the vehicle in question be "qualified to be registered and used as" a farm truck, farm trailer or farm semitrailer and tractor. *Id.* If they were not so entitled, then they were "commercial motor vehicles" and their consumption was subject to surtax.

C. "FARM-PLATED" VEHICLE STATUTORY AND REGULATORY BACKGROUND

1. Motor Carrier Fuel Tax Statutes and Regulations Governing the "Farm-Plated" Vehicle Exemption

IC § 6-6-4.1-1(b) defines a "commercial motor vehicle" in relevant part as "a vehicle . . . not excluded from the application of this chapter under [IC § 6-6-4.1-2(b)]." The "farm-plated" vehicle exclusion is found in IC § 6-6-4.1-2(b)(4). The General Assembly added it to the Motor Carrier Fuel Tax Law the year after it enacted the latter statute. P.L. 89-1983, sec. 1, 1983 Ind. Acts 723, 723. At the beginning , and for the first six quarters, of the taxpayer's investigation period, IC § 6-6-4.1-2(b)(4) read as follows:

> (b) This chapter does not apply to:
>
> …
>
> (4) trucks, trailers, or semitrailers and tractors that are qualified to be registered and used as farm trucks, farm trailers, or farm semitrailers and tractors and that are registered as such by the bureau of motor vehicles under IC 9-1-4-41(c) [(1988)] or under a similar law of another state[.]

P.L. 89-1983, sec. 1, 1983 Ind. Acts 723, 723, as amended by P.L. 77-1985, sec. 26, 1985 Ind. Acts 672, 684 and P.L. 8-1988, sec. 3, 1988 Ind. Acts 458, 460. The same session law that contained the Surcharge Tax Act also redesignated former IC § 9-1-4-41(c) as former IC § 9-1-4-41(i). *Compare* P.L. 59-1985, secs. 17 and 30, 1985 Ind. Acts 553, 566 and 582-83, respectively. The redesignation took effect on January 1, 1986. *Id*. sec. 43, 1985 Ind. Acts at 589. However, the General Assembly never enacted a conforming technical amendment to IC § 6-6-4.1-2(b)(4) to reflect this change. This legislative omission appears to the Department to have been inadvertent. It is permissible to interpret a statute that incorrectly cites to a section in another act as referring to a third section, if there is no difficulty in understanding the citing statute as referring to a provision other than the one cited. *Cummins v. Pence*, 91 N.E. 529, 532 (Ind. 1910). The Department will therefore administratively construe the citation to "IC 9-1-4-41(c)" in IC § 6-6-4.1-2(b)(4) (Supp. 1990) as referring to former IC § 9-1-4-41(i) for all reporting periods beginning on or after January 1, 1986 and ending on or before June 30, 1991. This interpretation will therefore apply to the present taxpayer's protest for calendar 1990 and the first two quarters of 1991.

In its 1991 session the General Assembly recodified IC title 9, the state's motor vehicle code, by enacting P.L. 2-1991, 1991 Ind. Acts 191. P.L. 2-1991 also amended IC § 6-6-4.1-2(b)(4) to conform to the recodification of IC title 9. *Id.* sec. 42, 1991 Ind. Acts at 688. Both the recodification and the amendment took effect July 1, 1991. *See* IC § 1-1-3-3(b) (1988 and 1993), which makes the effective date of an act passed at a regular legislative session the July 1 following enactment if the act does not specify a different date. After that amendment IC § 6-6-4.1-2(b)(4) read for the remainder of the present taxpayer's investigation period, and still reads, as follows:

> (b) This chapter does not apply to:
>
> …
>
> (4) trucks, trailers, or semitrailers and tractors that are qualified to be registered and used as farm trucks, farm trailers, or farm semitrailers and tractors and that are registered as such by the bureau of motor vehicles under IC 9-18 [(Supp. 1991 and 1993)] or under a similar law of another state[.]

Id. IC art. 9-18 sets out the general procedures for registering and obtaining license plates for motor vehicles. The fees charged under IC art. 9-18 are set forth in IC ch. 9-29-5. The reduced fees for the farm motor vehicles described in IC § 6-6-4.1-2(b)(4) and the criteria that a vehicle must meet to qualify for those fees, are set out in IC § 9-29-5-13, quoted below.

Lastly, 45 IAC § 13-2-2(5), the regulation implementing IC § 6-6-4.1-2(b)(4), read as follows throughout the taxpayer's investigation period:

> Sec. 2. The following commercial motor vehicles are exempt from the application of IC 6-6-4.1:
>
> …
>
> (5) after January 1, 1984, trucks, trailers, or semitrailers and tractors so long as the commercial motor vehicle:
>
> (A) *is qualified to be registered and used as a farm truck, farm trailer, or farm semitrailer and tractor*;
>
> (B) *is registered as such* by the Indiana bureau of motor vehicles; and
>
> (C) *is not operated, either part time or incidentally, in the conduct of any commercial enterprise or in the transportation of farm products after such commodities have been delivered to the first point of delivery, where the commodities are weighed and title is transferred.*

Id (emphases added). The comparable federal fuel excise tax provisions are narrower than IC § 6-6-4.1-2(b)(4) as interpreted by 45 IAC § 13-2-2(5). Diesel fuel and gasoline must be used "on a farm for farming purposes" to be exempt from the federal taxes, or to have any such taxes collected credited against the farmer's income tax. Title 26 U.S.C. (I.R.C.) §§ 34(a)(1) and (a)(3), 4041(f), 6420(a), (c)(1) to (c)(3) and (g), 6427(c), (k)(1) and (k)(3) (1994). The oldest of these statutes to use the phrase "on a farm for farming purposes" is I.R.C. § 6420(a), which Congress enacted in Pub. L. 466, sec. 1, 70 Stat. 87, 87-88 (1956). Shortly after that enactment, the IRS interpreted I.R.C. § 6420(a) to mean that a farmer taxpayer is not entitled to relief concerning gasoline consumed on the public highways in transporting agricultural or horticultural products from the farm to market. Rev. Rul. 58-289, 1958-1 C.B. 494. The same rationale presumably bars relief under the other statutes as well.

Unlike the foregoing federal authorities, IC § 6-6-4.1-2(b)(4) as interpreted by 45 IAC § 13-2-2(5) does not restrict its exemption to motor fuel consumed on a farm. A farmer may therefore consume motor fuel on Indiana public highways exempt from motor carrier fuel and surcharge taxes if the consumption is done by a motor vehicle pursuant to 45 IAC § 13-2-2(5). That regulation requires in part that the motor vehicle be both "farm plated" and entitled to such plating. It

is the latter requirement that identifies the circumstances under which such exempt consumption may take place, as the following discussion will show.

2. Substantive Motor Vehicle "Farm Plating" Statutes

IC § 9-1-4-41(i) (Supp. 1990) (formerly IC § 9-1-4-41(c) (Supp. 1984) and IC § 9-29-5-13(b) and (c) (Supp. 1991 and 1993), which are in substance the same, set out the applicable qualifications for farm plating. Like the first version of IC § 6-6-4.1-2(b)(4) set out above, IC § 9-1-4-41(i) controlled the first six quarters of the investigation period. It read in relevant part as follows:

> Any owner of a motor vehicle, trailer or semi-trailer and tractor operated primarily as a farm truck, farm trailer, or farm semi-trailer and tractor having a declared gross weight of eleven thousand (11,000) pounds or more, *used by the owner or guest occupant in connection with agricultural pursuits usual and normal to the user's farming operation*, shall pay a license fee equal to fifty percent (50%) of the amount listed in this subsection for a truck, trailer or semitrailer and tractor of the same declared gross weight. Such "farm truck", "farm trailer", or "farm semitrailer and tractor" shall be identified as such in accordance with a regulation established by the bureau and *shall not be operated either part time or incidentally in the conduct of any commercial enterprise, or for the transportation of farm products after such commodities have entered the channels of commerce. For the purposes of this section, a commercial enterprise does not include the transportation of a farm commodity from the place of production to the first point of delivery where the commodity is weighed and title to the commodity is transferred.* A farm truck may be used for personal purposes if the vehicle otherwise qualifies for that class of registration.

Id (emphases added). The legislature enacted the original version of the above language in 1969 and two years later classified it to the then-new Indiana Code, originally as part of IC § 9-1-4-41(c) (1971). Ch. 321, sec. 1, 1969 Ind. Acts 1337, 1342 and P.L. No. 114, sec. 1, 1971 Ind. Acts 522, 527, respectively. The General Assembly revised the statute to substantially the above form by amendments in 1977, 1979 and 1980. P.L. 119, sec. 1, 1977 Ind. Acts 598, 604; P.L. 105, sec. 1, 1979 Ind. Acts 448, 454; and P.L. 10, sec. 15, 1980 Ind. Acts 355, 374-75, respectively. In 1983, the same year that the General Assembly enacted IC § 6-6-4.1-2(b)(4), it also amended former IC § 9-1-4-41(c) (1982) to allow the described vehicles to be used "primarily," instead of "exclusively," as farm vehicles, and to add the last sentence authorizing personal use of farm vehicles. P.L. 118-1983, sec. 4, 1983 Ind. Acts 901, 912-13. (As previously discussed above, former IC § 9-1-4-41(c) was redesignated as former IC § 9-1-4-41(i), and the Surcharge Tax Act was enacted, in 1985).

P.L. 2-1991, sec. 109, 1991 Ind. Acts at 736, repealed former IC arts. 9-1 to -12 (1988), including former IC § 9-1-4-41(i), as part of the recodification of IC tit. 9 described above. The legislature replaced the part of former IC § 9-1-4-41(i) set out above with current IC § 9-29-5-13 (Supp. 1991 and 1993), which reads as follows:

> Sec. 13. (a) This section does not apply to a vehicle or person exempt from registration under IC 9-18[-1-1(1) to (3), which respectively exempt farm wagons, farm tractors and farm machinery].
>
> (b) The license fee for a motor vehicle, trailer, or semitrailer and tractor operated primarily as a farm truck, farm trailer, or farm semitrailer and tractor:
>
> > (1) having a declared gross weight of at least eleven thousand (11,000) pounds; and
> >
> > (2) *used by the owner or guest occupant in connection with agricultural pursuits usual and normal to the user's farming operation;*
>
> is fifty percent (50%) of the amount listed in this chapter for a truck, trailer or semitrailer and tractor of the same declared gross weight.
>
> (c) A farm truck, farm trailer, or farm semitrailer and tractor described in subsection (b) *may not be operated either part time or incidentally in the conduct of a commercial enterprise or for the transportation of farm products after the commodities have entered the channels of commerce.*
>
> (d) A farm truck described in subsection (b) may be used for personal purposes if the vehicle otherwise qualifies for that class of registration. *As added by P.L. 2-1991, SEC. 17*[, 1991 Ind. Acts 191, 597-98].

(Emphases added.) As can be seen, IC § 9-29-5-13(b) through (d) and the part of former IC § 9-1-4-41(i) quoted above are the same except for formatting and the relocation of the next to last sentence of that quotation, which defined "commercial enterprise," to IC § 9-13-2-30 (Supp. 1991 and 1993) with immaterial stylistic changes. *See* P.L. 2-1991, sec. 1, 1991 Ind. Acts at 197, which created current IC § 9-13-2-30. Subsection 111(a) of P.L. 2-1991, 1991 Ind. Acts at 737, says that

> [t]his act is intended to be a codification and restatement of applicable or corresponding provisions repealed by SECTION 109 of this act. If this act repeals and replaces a provision in the same form or in a restated form, *the substantive operation and effect of that provision continue uninterrupted.*

(Emphasis added.) Case law specifies the same result where a statute is simultaneously repealed and re-enacted. Under such circumstances the legislature intends that "*the law continue[] uninterrupted.*" *Van Allen v. State*, 467 N.E.2d 1210, 1214 (Ind. Ct. App. 1984) (emphasis in original; hereafter "*Van Allen*"). Both the repeal of former IC § 9-1-4-41(i) and its replacement with IC § 9-29-5-13 were effective July 1, 1991 by operation of IC § 1-1-3-3(b). The Department therefore

must interpret current IC § 9-29-5-13(b) through (d) the same as the above quotation from former IC § 9-1-4-41(i) as a matter of law.

D. "FARM PLATING" ISSUES AFFECTING TAXPAYER'S TRUCKS' STATUS

During the taxpayer's investigation period only one set of criteria thus existed under the above statutes and regulation to exclude the fuel consumed by a "farm-plated" motor vehicle from surtax. Specifically, those criteria are that the alleged farm truck, farm trailer or farm semitractor and trailer:

1. Be qualified for "farm plating" by:

   a. Having a declared gross weight of eleven thousand (11,000) pounds or more; and

   b. Being used "in connection with [an] agricultural pursuit[ ] usual and normal to [the farmer's] farming operation";

2. Be "farm-plated" in fact; and

3. Not be "operated either part-time or incidentally in the conduct of a commercial enterprise[.]"

There is no question that the taxpayer's trucks meet the minimum weight criterion for "farm plating"; all of the trucks used in the peat hauling operation weighed more than eleven thousand pounds (11,000 lb.). Nor is there any dispute that the motor vehicles were actually "farm plated." The questions left therefore are:

1. Was the taxpayer's use of the farm-plated trucks in the peat-hauling operation "in connection with [an] *agricultural pursuit usual and normal to [his] farming operation*"?

2. If the answer to Question 1 is "no," was the taxpayer operating those trucks "in the conduct of a *commercial enterprise*"?

(Emphases added.) In arriving at an answer to each question, certain rules of statutory interpretation will apply. The legislature in enacting a statute is presumed to be aware of court decisions (including federal court decisions) on the subject in question. *E.g., Stith Petroleum Co. v. Department of Audit and Control*, 5 N.E.2d 517, 519 (Ind. 1937). It is also presumed to be aware of existing statutes on the same subject. *E.g., Johnson County Farm Bureau Coop. Ass'n, Inc. v. Indiana Dep't of State Revenue*, 568 N.E.2d 578, 583 (Ind. Tax 1991), *aff'd and adopted* 585 N.E.2d 1336 (Ind. 1992). This presumed awareness of related statutes includes an awareness of judicial interpretations of those laws. *E.g., Grave v. Kittle*, 101 N.E.2d 830, 834 (Ind. App. 1951) (*en banc*). Lastly,

> [b]ecause of the rule that legislative enactments in derogation of common law must be strictly construed and narrowly applied, [citations omitted], [the Indiana Supreme Court] presume[s] that the legislature is aware of the common law and does not intend to make any change therein beyond what it declares either in express terms or by unmistakable implication. [Citations omitted.]

State Farm Fire & Cas. Co. v. Structo Div., King Seeley Thermos Co., 540 N.E.2d 597, 598 (Ind. 1989) (hereafter "*Structo*"). The General Assembly therefore was presumably aware of all the federal and Indiana acts on or affecting agriculture (including crops), and of all of the judicial opinions interpreting those statutes, that were in existence when it enacted the various statutes pertaining to "farm plating." The legislature was also aware of Indiana common law judicial decisions concerning or affecting agriculture and crops, which remain good law if a statute has not changed them. The Department's following analysis will be based on these premises. In addition, where not inconsistent with controlling federal or Indiana law, the Department will refer to judicial decisions from other states that the Department has found to be persuasive and helpful to its analysis.

E. "AGRICULTURAL PURSUITS"

1. Introduction

Neither IC titles 6 nor 9 define the words "agricultural" or "pursuits," or the phrase "agricultural pursuits," nor has the Department found any other statute that defines "agricultural pursuit" or "agricultural pursuits" comprehensively. The Department has found only one other place in the Indiana Code in which the phrase "agricultural pursuits" appears. That statute is IC § 20-12-37-4 (1988, 1993 and 1998), which makes "involve[ment] in agricultural pursuits[,] *id.*, a qualification for two of the members of the board of trustees of Purdue University. However, the Department did not find a definition of "agricultural pursuits" in IC ch. 20-12-37. The only federal statute that the Department has found that uses the phrase "agricultural pursuit" is 7 U.S.C. § 433(c) (1988 and 1994), which codifies ch. 242, sec. 1, 60 Stat. 127 (1946). It states that for purposes of all federal statutory and regulatory authorities concerning the raising of fur-bearing animals in captivity, "the breeding, raising, producing, or marketing of such animals or their products by the producer shall be deemed an agricultural pursuit." *Id.* This statute (like IC §§ 9-13-2-54 and 9-20-4-2(a) and (c), which the taxpayer has cited to support its interpretation of the terms "farm product" or "farm commodity") simply insures that the activities described will be treated as being agricultural under other statutes. It does not purport to give a comprehensive definition of "agricultural pursuit." For this reason, the federal statute gives the Department guidance only as to the activities that the statute explicitly describes in determining what "agricultural pursuits" means or includes as used in former IC § 9-1-4-41(i) and current IC § 9-29-5-13(b).

The Department did not find any court opinions in the course of its research that construe the phrases "agricultural pursuit" or "agricultural pursuits" as used in any of the foregoing statutes. (However, as discussed below, there are opinions that define or describe "agriculture." There are also opinions that, in speaking generally about agriculture, refer to "agricultural pursuits.") It is therefore necessary for the Department to resort to the rules of statutory interpretation. "[A] statute is examined and interpreted as a whole and the language itself is scrutinized, including the grammatical structure of the clause or sentence at issue." *Clifft v. Indiana Dep't of State Revenue,*

660 N.E.2d 310, 316 (Ind. 1995). The words "agricultural pursuits" are a noun phrase, *i.e.* a group of closely related words used as a noun. M. SHERTZER, THE ELEMENTS OF GRAMMAR 6 (1986). The noun phrase itself consists of the adjective "agricultural" and the noun "pursuits," which it modifies. Since "pursuits" is the root word of this phrase, the Department will determine its meaning as used in context first. To do so, as previously noted, the Department will refer to WEBSTER'S THIRD.

2. Definitions of "Pursuit": The Agricultural Vocation Versus Agricultural Work/Labor

The most nearly applicable definition of "pursuit" in WEBSTER'S THIRD's describes it as "an activity that one pursues or engages in seriously and continually or frequently as a *vocation or profession* or as an avocation . . . : a way of life: OCCUPATION . . . ." *Id.* at 1848, definition 2 a (emphasis added). Title 7 U.S.C. §433(c) and IC § 20-12-37-4, both previously mentioned above, appear to use the word in this sense, as do the Indiana judicial opinions that have mentioned "agricultural pursuits." For example, *State ex rel. Simpson v. Meeker*, 105 N.E. 906 (Ind. 1914), was a mandamus action to compel a county council to appropriate funds to pay part of the salary of a county agricultural agent. The Indiana Supreme Court reversed the trial court, which had ruled for the council. In doing so, the court observed that "[o]f necessity, the training of one about to engage in *agricultural pursuits* will differ materially from that of the artisan, and different methods of instruction and different sources of information must be supplied in the two instances." *Id.* at 908 (emphasis added). *Downing v. Indiana State Board of Agriculture*, 28 N.E. 123 (Ind. 1891), described the State Board of Agriculture created in 1851 (a predecessor in interest of the current State Fair Board) as "seek[ing] to bring together people engaged in *agricultural pursuits*," *id.* at 126 (emphasis added), and referred twice thereafter on the same page to "those engaged in *agricultural pursuits*[.]" *Id* (emphasis added). More recently, *Day v. Ryan*, 560 N.E.2d 77 (Ind. Ct. App. 1990) (hereafter "*Ryan*"), a zoning ordinance violation opinion, said "[t]hat the [defendants'] raising of the crops and the livestock were *agricultural pursuits* is beyond question." *Id.* at 81 (emphasis added). *Shatto v. McNulty*, 509 N.E.2d 897 (Ind. Ct. App. 1987), a nuisance abatement opinion, says that "[p]eople may not move to an established agricultural area and then maintain an action for nuisance against farmers because their senses are offended by the ordinary smells and activities which accompany *agricultural pursuits*." *Id.* at 900 (emphasis added). The Department will therefore hereafter refer to the phrase "agricultural pursuits" in the sense that these authorities use it as being "the agricultural vocation."

Grammatical problems arise, however, if "agricultural pursuits" means "the agricultural vocation." Since the statute uses the plural "pursuits," inserting this definition would cause the phrase to read "agricultural [vocations, professions, or occupations] usual and normal to [the motor vehicle user's] farming operation". As the discussion in the following subsection of this letter will explain in detail, "the term 'agriculture' is defined as *the* art or science of cultivating the soil, including the planting of seed, the harvesting of crops, and the raising, feeding and management of live stock or poultry." *Fleckles v. Hille*; 149 N.E. 915, 915 (Ind. App. 1925) (emphasis added). The use of the definite article "the" indicates that "agriculture" is a single (not plural) art or science; by extension, it is a single vocation, profession or occupation. Although it is possible to specialize in a particular type of agriculture, as the discussion below will show, it would be impossible for a motor vehicle user to engage in the general occupation of agriculture more than once at the same time, especially with respect to a single "farming operation."

However, "pursuit" is also a synonym of "work." WEBSTER'S THIRD at 1848 (defining "pursuit"). The same dictionary defines the noun "work" in relevant part as "*a specific task, duty, function, or assignment* often being a part or phase of some larger activity[.]" *Id.* at 2634, definition 1 e (emphasis added). If "pursuits" is read as meaning "work," the phrase in which "pursuits" appears would read "agricultural [work, tasks, duties, functions or assignments] usual and normal to [the motor vehicle user's] farming operation". This reading is much more natural than that which results from defining "pursuits" in its vocational sense, and is therefore probably what the General Assembly meant. The Department therefore administratively interprets the word "pursuits" in former IC § 9-1-4-41(i) and current IC § 9-29-5-13(b)(2) as meaning "work," and the phrase "agricultural pursuits" as meaning "agricultural work" or "agricultural labor." The Department will hereafter use one of these latter phrases when it refers to "agricultural pursuits" in this sense.

3. Judicial and Statutory Definitions of "Agriculture," "Agricultural" and Related Terms

a. Basic Judicial Definition of "Agriculture" Under Indiana Law

The most authoritative Indiana case to define "agriculture" is *Fleckles v. Hille*; 149 N.E. 915 (Ind. App. 1925) (hereafter "*Fleckles*"). That opinion interpreted the "farm or agricultural employee" exemption from entitlement to benefits found in the former Workmen's Compensation Act, ch. 106, sec. 9, 1915 Ind. Acts 392, 394, as amended by ch. 157, sec. 1, 1919 Ind. Acts 158, 159. The legislature re-enacted this statute as part of the current Workers' Compensation Act without change. Ch. 172, sec. 9, 1929 Ind. Acts 536, 539, codified as amended at IC § 22-3-2-9(a) (1988 and 1993 and Supp. 1997). By doing so the then Indiana Supreme Court deemed the General Assembly to have acquiesced in and adopted the then Indiana Appellate Court's interpretation of that statute in *Fleckles* and other opinions of the latter court. *Heffner v. White*, 47 N.E.2d 964, 966 (Ind. 1943). Moreover, a unanimous Indiana Supreme Court itself later quoted and thereby adopted *Fleckles'* definition of "agriculture" in *H.J. Heinz Co. v. Chavez*, 140 N.E.2d 500, 502 n.1 (Ind. 1957) (hereafter "*Chavez*"). Since both this state's legislature and highest court have adopted *Fleckles'* general definition of "agriculture," this definition is therefore the starting point for determining what "agriculture" is, includes and excludes, both in fact and in law, in Indiana.

In *Fleckles*, the then Industrial Board had made a worker's compensation award in favor of an employee of an egg- and poultry-producing business located on a farm, and the employer appealed that award to the Appellate Court. Deciding whether the Industrial Board had erred required the court to interpret the "farm or agricultural employee" exemption of the Workmen's Compensation Act cited above. In reversing the award, the court said that

> It is contended by appellee, and apparently the Industrial Board adopted that view, that in the operation of the farm appellants were in the business of raising poultry, to which business farming by them was but incidental; and that appellee was, therefore, not a farm or agricultural employee. This contention cannot prevail. *The terms "farm employee" and "agricultural employee" as used in this state have substantially the same meaning. If there is any difference, the latter expression, which necessarily includes the former, has a broader meaning.* See *Davis v. Industrial Comm.* (1922), 59 Utah, 607, 206 P. 267 [hereafter "*Davis*"].

> *The term "agriculture" is defined as the art or science of cultivating the soil, including the planting of seed, the harvesting of crops, and the raising, feeding and management of live stock or poultry.* See Webster's Dictionary; ; [other citations omitted].

149 N.E. at 915-16 (emphases added). Based on this analysis and definition, the court held that the employee was exempted from the act as a "farm or agricultural employee" because poultry production was agriculture. *Id.* at 916.

Fleckles implies that "agriculture" might be a broader word than "farming." *See* 149 N.E. at 915, as set out above. *Ryan*, quoted in the preceding subsection, asserts this proposition more emphatically, 560 N.E.2d at 81, citing *Fleckles*. In other words, all farming is agriculture, but not all agriculture is farming; farming and agriculture are substantially, but not totally, equivalent. Neither *Fleckles* nor *Ryan* explains the distinction between agriculture and farming. However, *Davis* cited in *Fleckles*, casts some light on the distinction by discussing agriculture at length and mentioning some of the activities besides farming that agriculture includes. In the course of that discussion the *Davis* court drew "the distinction between arable agriculture, which includes the cultivation of the ground and the growth of crops, and pastoral agriculture, which comprises merely the feeding and management of the flocks and herds of the farm[.]" 206 P. at 268 (internal quotation marks omitted). The court also noted during that discussion that agriculture can include "gardening or horticulture[,]" *id.*, an activity of tangential relevance to deciding the present protest.

However, *Fleckles* makes it clear that "[t]he terms 'farm employee' and 'agricultural employee' *as used in this state* have substantially the same meaning." 149 N.E. at 915 (emphasis added). The Department infers from this emphasized language that the Appellate Court impliedly took judicial notice that the overwhelming majority of agricultural activity in Indiana is farming, *i.e.* arable agriculture as described in *Davis*. (Matters of common knowledge are the kinds of facts that are judicially notable without the presentation of proof. *E.g., School City of Gary v. State ex rel. Gary Artists' League, Inc.*, 256 N.E.2d 909, 912 (Ind. 1970)). The inference that the Appellate Court judicially noted that agriculture in Indiana is substantially equivalent to farming is justified for two reasons. First, the Indiana Supreme Court had held, well before the Appellate Court decided *Fleckles*, that "[t]he courts take judicial notice of seasons, and of the general course of agriculture." *Abel v. Alexander*, 45 Ind. 523, 528 (1874). *Ross v. Boswell*, 60 Ind. 235, 240 (1877) and *Abshire v. Mather*, 27 Ind. 381, 382 (1866), are to the same effect. The Department interprets these pre-*Fleckles* holdings as allowing Indiana judges to judicially note the generally known conditions in Indiana as they affect agriculture, including the climate, soil, land usage and products resulting from agricultural activity. Second, in *Fleckles* itself, after substantially equating "farm employee" and "agricultural employee" the court went on to note that "[i]n this state it is *a matter of common knowledge* that poultry production by Indiana farmers is well nigh universal[.]" 149 N.E. at 916 (emphasis added).

Considered in this overall context, it thus becomes apparent that the Appellate Court in *Fleckles* based its interpretation of the phrase "farm or agricultural employee" on its judicially noting that agriculture in Indiana is in fact substantially equivalent to farming. This is not to say that *Fleckles* defines the words "farm" or "farming," as distinguished from agriculture; it does not. How-

ever, those meanings become clear from the dictionary definitions of "farm" and "farming," both standing alone and as contrasted with the distinction between arable and pastoral agriculture that *Davis* draws and the definition of "agriculture" in *Fleckles*. The relevant definition of the noun "farm" in one contemporary dictionary described it as "[a] tract of land devoted to general or special *cultivation* under a single control, whether that of its owner or of a tenant: as, a small *farm*; a wheat-, fruit-, dairy-, or market-*farm*." CENTURY DICTIONARY AND CYCLOPEDIA 2143 (1911) (definition 5; first emphasis supplied; later emphases in original; hereafter "CENTURY DICTIONARY"). The substance of this definition is included in the relevant definitions of the same word in one version of Webster's Dictionary in existence less than a decade after *Fleckles* was decided, which read as follows:

> **6.** Orig[inally], a piece of land held under lease for *cultivation*; hence, any tract of land (whether consisting of one or more parcels) devoted to agricultural purposes, generally under the management of a tenant or the owner; any parcel or group of parcels of land *cultivated* as a unit.
> **7.** Hence, *a plot or tract of land* devoted to the raising of domestic or other animals; as, a chicken *farm*; a fox *farm*. By extension, a tract of water reserved for the artificial cultivation of some aquatic food; as, an oyster *farm*.

WEBSTER'S NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE 919 (2nd ed. unabridged 1934, reprinted 1947; previous printings 1909-30 *passim*) (first two emphases added; remaining emphases in original; hereafter "WEBSTER'S SECOND"). (WEBSTER'S THIRD carried these latter definitions forward without any significant change, except to add "tree farm" as a further illustration. *Id.* at 824.). The relevant definitions of the transitive verb "farm" are to the same effect. The CENTURY DICTIONARY's definition states that to farm is "*[t]o cultivate, as land; till and plant.*" *Id.* at 2143 (definition 4; emphasis added). The WEBSTER'S SECOND definition is not only in accord with, but includes the substance of, that of the CENTURY DICTIONARY. WEBSTER'S SECOND states that to farm is "[t]o devote (land) to agriculture; *to cultivate, as land, to till*, as a farm; to use (land) as a farm." *Id.* at 919 (definition 5; emphasis added).

It is thus clear that farming at a minimum is the cultivation of the soil (which, under *Fleckles*, "include[es] the planting of seed [and] the harvesting of crops," 149 N.E. at 915), and can also include the raising of animals. *Ryan* explicitly recognized these concepts when it said "[t]hat the [zoning ordinance violation defendants'] raising of the crops and the livestock were *agricultural pursuits* is beyond question. *Indeed, these activities are the quintessence of farming[.]*" 560 N.E.2d at 81 (emphases added). Moreover, these are the same activities that *Fleckles*, and later *Chavez*, recognized in defining "agriculture" as " 'the art or science of cultivating the soil, including the planting of seed, the harvesting of crops, and the raising, feeding and management of live stock or poultry.' " *Chavez*, 140 N.E.2d at 502 n.1 (quoting *Fleckles*, 149 N.E. at 915 (in turn citing, *inter alia*, Webster's Dictionary)). Comparing these definitions thus makes clear the meanings of both *Fleckles*' statement that "[t]he terms 'farm employee' and 'agricultural employee' as used in this state have substantially the same meaning[,]" 149 N.E. at 915, and the implication of that statement that agriculture in Indiana is substantially equivalent to farming.

As previously discussed above, the Indiana Supreme Court recognized in *Heffner* that the legislature had acquiesced in the interpretation of the "farm or agricultural employee" exemption from the Workmen's Compensation Act in opinions such as *Fleckles* and *Chavez*. In addition, as was also explained earlier, the General Assembly in enacting a statute is presumed to be aware of existing statutes on the same subject, and the judicial interpretations of those statutes. Thus, the legislature, in enacting what became former IC § 9-1-4-41(i), and current IC § 9-29-5-13(b) and (c), in 1969 and 1991, respectively, was presumably aware both of *Fleckles* and *Chavez* and its own acquiescence in those opinions. By logical extension, the legislature was also presumably aware of, and adopted, *Fleckles*' implied substantial equating of agriculture in Indiana to farming. The wording of these statutes supports this inference. Both require that to be eligible for "farm plating," the truck, trailer or semitractor and trailer in question must be "used by the owner or guest occupant in connection with *agricultural* pursuits usual and normal to the user's *farming* operation[.]" *Id* (emphases added).

b. Scope of Agriculture as Shown by Indiana Statutory Definitions of Agriculture-Related Terms

When the General Assembly first enacted the "farm plating" statute in 1969, its awareness of related law was not restricted to the Workmen's Compensation Act and judicial opinions defining agriculture under that statute. The legislature was presumably also aware of other statutes it had previously enacted that included activities other than traditional farming in defining agriculture or agriculture-related terms. By necessary implication, agriculture includes the activities to which these terms relate.

For example, shortly before the Appellate Court decided *Fleckles*, Indiana, like many other states, had passed a Co-operative Marketing Act as a response to the then- depressed state of farm product prices. Ch. 20, 1925 Ind. Acts 42, as amended, codified at IC ch. 15-7-1 (1988 and 1993). The purposes of the act are, in relevant part, "to promote, foster, and encourage the intelligent and orderly production and marketing of *agricultural products* through cooperation; … and to make the distribution of *agricultural products* between producer and consumer as direct as can be efficiently done[.]" *Id.* subsec. 1(a), 1925 Ind. Acts at 42, as amended by ch. 34, sec. 1, 1931 Ind. Acts 79, 79, codified at IC § 15-7-1-1(a) (emphases added). As a means to these ends the act authorizes the formation of not-for-profit corporations, which the act defines as "associations," "to engage in any activity in connection with the production, marketing or selling of the *agricultural products* of its members[,]" among other activities. *Id.* sec. 4, 1925 Ind. Acts at 43, as amended by ch. 34, sec. 3, 1931 Ind. Acts 79, 80, codified at IC § 15-7-1-4 (emphasis added). The act makes, among other entities," persons engaged in the production of *agricultural products*[,]" eligible to form such associations. *Id.* sec. 3, 1925 Ind. Acts at 43, codified as amended at IC § 15-7-1-3 (emphasis added).

Given the number of times that the term "agricultural products" appears in the Indiana Co-Operative Marketing Act, and its effect on entitlement to participate in forming co-operative associations, it is not surprising that the General Assembly defined this term in the statute. That definition appears in subsec. 2(a) of the act, 1925 Ind. Acts at 43, codified at IC § 15-7-1-2(a). The legislature has amended section 2 of the act several times, including in P.L. 183-1983, sec. 132, 1983 Ind. Acts 1189, 1243, which made certain technical, non-substantive amendments to IC § 15-7-1-2. However, the General Assembly has never amended the definition of

"agricultural products" appearing in IC § 15-7-1-2(a), despite these repeated opportunities to do so, including in 1983. As has been previously noted, the legislature also added the "farm plating" exemption of IC § 6-6-4.1-2(b)(4) to the Motor Carrier Fuel Tax Law in 1983. Statutes enacted (or, in the case of IC § 15-7-1-2(a), re-enacted) at the same session of the General Assembly are to be interpreted *in pari materia* (*i.e.*, harmoniously). *E.g., Lutz v. Arnold*, 193 N.E. 840, 848 (Ind. 1935) (hereafter "*Arnold*"). The definition of "agricultural products" in IC § 15-7-1-2(a) thus gives a good indication of what the legislature considered agriculture to include for purposes of the "farm plating" exemption. The definition is also helpful because the delivery of agricultural products over the roads is presumably the first step in the marketing process that the Indiana Co-Operative Marketing Act was enacted to promote.

IC § 15-7-1-2(a) classifies a variety of products as being agricultural, at least when they are produced on a farm. It states that "[t]he term 'agricultural products' shall include horticultural, viticultural, forestry, dairy, livestock, grain, poultry, bee and any other *farm* products." *Id* (emphasis added). The act uses the various adjectives that describe the products included in this definition in their plain, or ordinary and usual, sense, which requires reference to dictionaries contemporary to the passage of the act in 1925 to learn their respective meanings. "Horticultural" and "viticultural" are the adjectives derived from the nouns "horticulture" and "viticulture," respectively. The CENTURY DICTIONARY defined "horticulture" as being "the cultivation of a garden; the art of *cultivating* or managing gardens[.]" *Id.* at 2894 (emphasis added). However, this definition went on to note that "[t]he ordinary productions of horticulture are generally classed under the three heads of fruits, flowers, and vegetables, *which on a large scale are cultivated separately*, …." *Id* (emphasis added). The definition thus tacitly recognized that horticulture can be vocational as well as avocational. The WEBSTER'S SECOND definition of "horticulture" described it as being "[t]he cultivation of a garden or orchard; the science and art of growing fruits, vegetables, and flowers or ornamental plants. *Horticulture is one of the main divisions of agriculture.* Cf. FLORICULTURE, VITICULTURE, OLERICULTURE." *Id.* at 1204 (emphasis added). The CENTURY DICTIONARY definition of "viticulture" called it "the culture or cultivation of the [grape]vine[,]" *id.* at 6774, going on to describe a "viticulturist" in part as "a grape-grower." *Id.* Since the grape is a fruit, and horticulture as previously defined includes the cultivation of fruit, viticulture is a form of horticulture. (Some years after passage of the Co-Operative Marketing Act, the Attorney General of Indiana confirmed substantially all of the foregoing propositions in an opinion construing another statute using the word "horticulturist." 1953 Op. Att'y Gen. No. 100, at 467. The Attorney General administratively construed " 'horticulture' … to encompass *only* the science or art of growing fruits, vegetables and flowers or ornamental plants." *Id.* at 469 (emphasis added).)

It is apparent from reviewing these various dictionary definitions that the General Assembly intended the term "agricultural products" to include the products of as many disciplines or vocations subsidiary to agriculture as possible in light of the state of agriculture in Indiana in 1925. However, the legislature's failure to amend this definition in 1983 indicated that the scope of agriculture under Indiana law either had not expanded at all in the meantime, or had expanded so little as not to require legislative attention. Although the General Assembly did enact statutes between 1925 and 1983 that linked additional vocations to agriculture, the Department will show below that these vocations are branches of disciplines that the legislature had already identified in IC § 15-7-1-2(a) as being agricultural.

For example, before it enacted the first farm plating statute in 1969, the General Assembly also had addressed agriculture for sales and use tax purposes. In 1965, the legislature had added an exemption from those taxes for tangible personal property directly consumed in the direct production in, among other activities, "agriculture, horticulture, floriculture, or arboriculture." Ch. 232, sec. 7, 1965 Ind. Acts 556, 572 (amending the Gross Retail and Use Tax Act, ch. 30, § 4, 1963 Ind. Acts (Spec. Sess.) 60, 63), recodified as amended at IC § 6-2.5-5-5.1 (1988 and 1993). Again resorting to a contemporary dictionary, in this case WEBSTER'S THIRD, "arboriculture" is defined as "the cultivation of trees and shrubs esp[ecially] for ornamental purposes[,]" while "floriculture" is "the cultivation and management usu[ally] on a commercial scale of ornamental and flowering plants[.]" *Id.* at 110 and 874, respectively. The definition of "horticulture" in WEBSTER'S THIRD is broader than that of WEBSTER'S SECOND and harmonizes with that of the CENTURY DICTIONARY previously quoted above. WEBSTER'S THIRD describes "horticulture" in relevant part as "the cultivation of an orchard, garden, *or nursery on a small or large scale* **:** the science and art of growing fruits, vegetables, *flowers or ornamental plants*. -- compare FLORICULTURE, OLERICULTURE, POMOLOGY." *Id.* at 1093 (emphases added).) Both arboriculture and floriculture are therefore forms of horticulture, which the definition from WEBSTER'S SECOND quoted above in turn recognized as being one of the principal branches of agriculture. (However, the previously cited Attorney General's opinion had already recognized that horticulture includes floriculture. 1953 Op. Att'y Gen. No. 100, at 469, citing *Hardin v. Vestal*, 162 S.W.2d 923, 925 (Ark. 1942)). In addition, the listing of "agriculture, horticulture, floriculture, or arboriculture[ ]" in close proximity to each other, together with the use of the disjunctive word "or," indicates that the General Assembly intended that horticulture, floriculture, and arboriculture be treated as activities that are forms of agriculture. The Indiana Supreme Court similarly construed a list of productive activities in another sales and use tax exemption statute as "overlap[ping] and at times encompass[ing] each other" in *Indiana Dep't of State Revenue v. Cave Stone, Inc.*, 457 N.E.2d 520, 524 (Ind. 1983).

The legislature elaborated on forms of existing categories of, and added subcategories of horticulture to, agriculture in 1971, when it amended former IC § 22-11-1-9 (1971) to exempt "farm service buildings" from the state building commissioner's jurisdiction to enforce building and safety regulations. P.L. No. 360, sec. 1, 1971 Ind. Acts 1471, 1471. Doing so required the General Assembly also to amend former IC § 22-11-1-1 to add a definition of the term "farm service building" as being, in relevant part, "any building or structure which is used for *agricultural purposes*[.]" P.L. No. 359, sec. 1, 1971 Ind. Acts 1468, 1468 (emphasis added; codified at IC § 22-12-1-4(c) (1988 and 1993) as an exception to the definition of "Class 1 structure"). The same act said that "the term 'agricultural purposes' means farming, dairying, pasturage, apiculture, horticulture, floriculture, vitaculture, [sic] ornamental horticulture, olericulture, pomiculture and animal and poultry husbandry[.]" *Id.* at 1468-69 (now codified as IC § 22-12-1-2). "Apiculture" is "beekeeping, esp[ecially] when pursued on a large scale[,]" WEBSTER'S THIRD at 100, and the legislature had already impliedly classified this activity as being agriculture by defining bee products as being "agricultural products" under IC § 15-7-1-2(a). "Olericulture" is "a branch of horticulture that deals with the production, storage, processing, and marketing of vegetables." WEBSTER'S THIRD at 1572. "Pomiculture" is "the art or practise of fruit-culture; pomology." FUNK & WAGNALLS NEW "STANDARD" DICTIONARY OF THE ENGLISH LANGUAGE 1926 (1958).

Both olericulture and pomiculture are thus forms of horticulture as previously defined above, the products of which are also "agricultural products" under IC § 15-7-1-2(a).

The General Assembly in 1925 therefore had already formed a nearly complete opinion of what agriculture included. It did not define agriculture simply by describing it in general terms, as *Fleckles* was to do shortly thereafter. Instead, the legislature did so by referring to the products resulting from specifically described activities involving the raising and use of particular categories of domesticated animals, the cultivation of trees and of particular categories of plants. The legislature did not change its opinion in 1980 or 1983, when it respectively enacted substantially the final form of what became former IC § 9-1-4-41(i), and IC § 6-6-4.1-2(b)(4). All that the General Assembly had done in its intervening agricultural enactments was simply to make its definition of agriculture, and by extension of the agricultural vocation, more explicit.

F. "USUAL AND NORMAL TO THE USER'S FARMING OPERATION" VERSUS "COMMERCIAL ENTERPRISE": WHEN WORK IS OR IS NOT AGRICULTURAL

1. The "Independent Productive Function" Test

Notwithstanding the breadth of the previously described activities that are included in agriculture, not every kind of work, task or duty related to agriculture is agricultural. Both the federal and the Indiana appellate courts have recognized this point. In *Farmers Reservoir & Irrigation Co. v. McComb*, 69 S.Ct. 1274 (U.S. 1949) (hereafter "*Farmers Reservoir & Irrigation*"), the U.S. Supreme Court had to decide whether employees of a mutual company producing water for its farmer shareholders were exempt from the federal minimum wage laws as being "employed in agriculture[.]" (*See* Fair Labor Standards Act of 1938 (hereafter "FLSA"), subsec. 3(f) and para. 13(a)(6), 52 Stat. 1060, 1060 and 1067, now codified as amended at 29 U.S.C. §§ 203(f) and 213(a)(6) (1994), which respectively define "agriculture" and exempting persons "employed in agriculture"). In holding that the employees were not exempt, the Court succinctly observed that "the conclusion that [a type of] work *is necessary* to agricultural production does not require [saying] that it *is* agricultural production." *Id.* at 1277 (emphases in original). *Ryan* later elaborated on this point. The latter opinion held in part that the expansion of what had previously been incidental livestock dealing activities on a Monroe County farm into a stockyard business violated the county's agricultural zoning ordinance.560 N.E.2d. at 82-83. In doing so, the panel stated that

> not all activities with an agricultural nexus are themselves agricultural. *In re Boyer* (1917), 65 Ind. App. 408, 117 N.E. 507; *Farmers Reservoir & Irrigation Co. v. McComb* (1949), 337 U.S. 755, 69 S.Ct. 1274, 93 L.Ed. 1672. In *Boyer*, the court held that an injured employee of a wheat threshing business was not an agricultural employee, but an industrial employee, eligible for workers' compensation benefits. The court found wheat threshing to be "a business or industrial pursuit in and of itself entirely separate and independent of farming. . . . [even though wheat threshing has] to do with getting the farm product ready for consumption." *Boyer*, 65 Ind. App. at 411, 117 N.E. at 508. [*Boyer* appears to use "pursuit" in its vocational, rather than its work, sense.] In *Farmers Reservoir*, the United States Supreme Court applied the same analysis [as *Boyer*], and stated:

> [F]unctions which are necessary to the total economic process of supplying an agricultural product, become, in the process of economic development and specialization, separate and independent productive functions operated in conjunction with the agricultural function but no longer part of it. Thus, *the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture* nor by the physical similarity of the activity to that done by farmers in other situations. *The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.* [Emphases added by the Department.]

Id., quoting 69 S.Ct. at 1278. (The dictionary definition of the noun "function" coming closest to the sense in which the U.S. Supreme Court appears to have used that word is "[p]rofession [or] occupation[.]" WEBSTER'S SECOND at 1019, definition 3.)

Under *Farmers Reservoir & Irrigation* and *Ryan*, the work, task or duty in question thus must be done as part of the farmer's agricultural vocation to qualify as statutorily exempt agricultural work. The range of work that qualifies as agricultural therefore is not open-ended. If the work is done as part of a vocation that is economically independent of agriculture, that task or duty is not agricultural work, and is not entitled to statutory exemption, even though the vocation for which the work is performed is related to agriculture. The legislature is presumed to have been aware of *Farmers Reservoir & Irrigation* in 1969, when it first enacted what became former IC § 9-1-4-41(i), and in 1983, when it enacted IC § 6-6-4.1-2(b)(4). It was also presumably aware of *Ryan*, which was decided in 1990, when it recodified the "farm plating" statute in 1991 as current IC § 9-29-5-13(b) without material change. The language the General Assembly chose for the "farm plating" statutes reflects its awareness of *Farmers Reservoir & Irrigation* and *Ryan*. Both former IC § 9-1-4-41(i) and current IC § 9-29-5-13(b) require that the farm truck, farm trailer or farm semitrailer and tractor be "used in agricultural pursuits usual and normal to the [farm vehicle] user's farming operation[.]" *Id.* The Department administratively construes this language as requiring that the farm vehicle operator use that vehicle in work that is part of the owner/taxpayer's agricultural vocation. Consistently with this interpretation, the Department construes IC § 6-6-4.1-2(b)(4) and 45 IAC § 13-2-2(5) as imposing the same requirement. Farmers must have used their trucks, trailers or semitrailers and tractors in work that is part of the farmer/taxpayer's agricultural vocation, *i.e.* the taxpayer's farm operation, to claim an exemption as exempt from motor carrier fuel and surcharge taxes. However, the use of the vehicle in question falls outside the scope of the above-quoted language if it is used in a vocation that is economically independent of, and intended to generate a source of regular income for the farmer in addition to, that operation. Such a vocation is a "commercial enterprise" as former IC § 9-1-4-41(i), current IC § 9-29-5-13(c) and 45 IAC § 13-2-2(5)(C) use that phrase. During the time that a farmer uses a farm truck, farm trailer or farm semitrailer and tractor in such an enterprise, that farmer is not eligible to claim the tax exemption for any of the fuel that the vehicle consumes.

2. Federal Judicial Opinions That Discuss the Occupational Status of Peat Extraction

The Department has discovered two court opinions that address the issue of whether peat operations comparable to the taxpayer's are agriculture, both of which answer this question in the negative. Like *Farmers Reservoir & Irrigation*, these decisions interpreted the agricultural exemption from the FLSA. They are *Wirtz v. Ti Ti Peat Humus Co.*, 373 F.2d 209 (4th Cir. 1967) (hereafter "*Ti Ti Peat Humus.*") and *Walling v. Georgia Peat Moss Co.*, 7 Lab. Cas. (CCH) ¶ 61,622 (M.D. Ga. 1943) (hereafter "*Georgia Peat Moss.*"). The more authoritative opinion of the two is *Ti Ti Peat Humus*, decided just two years before the General Assembly first enacted what eventually became former IC § 9-1-4-41(i). In *Ti Ti Peat Humus Co.* the employer, a South Carolina corporation engaged in the business of extracting, processing, packing and selling peat, became financially distressed and stopped paying its employees the minimum wage then in effect. The U.S. Department of Labor became aware of the situation and, through the Secretary of Labor, filed suit in federal district court in South Carolina to get an injunction requiring the employer to comply with the FLSA's minimum wage, maximum hour and record-keeping requirements. The employer defended by claiming two exemptions, one of which was the agricultural exemption of FLSA para. 13(a)(6), 29 U.S.C. § 213(a)(6) (1958).

The district court denied the injunction, holding that peat was an "agricultural commodity." 249 F.Supp. 166 (D. S.C. 1966), as discussed at 373 F.2d at 209-10. (FLSA subsec. 3(f), 29 U.S.C. § 203(f) defines agriculture in relevant part as "includ[ing] the cultivation and tillage of the soil, … [and] the … cultivation, growing, and harvesting of any *agricultural or horticultural commodities*[.]" *Id* [emphasis added]). The Secretary appealed the district court's denial of the injunction to the United States Court of Appeals for the Fourth Circuit, which reversed the district court's decision and remanded the case to that court with instructions to enter the injunction. 373 F.2d at 213.

The Court of Appeals, in describing the activities involved in the employer's operation, said "that the company had not planted or cultivated any growing plants which would contribute to the accumulated vegetation in the bog." 373 F.2d at 211. After addressing another issue, the Fourth Circuit observed that

> [t]he administrative treatment of peat indicates that it is not an agricultural commodity. In 1943 the Administrator of the Wage and Hour Division declared that the term 'agricultural and horticultural commodities' means *'commodities which are planted and cultivated by man,'* and 'since peat is not such a commodity the exemption does not apply to employees engaged in extracting, processing and distributing peat moss.' [Footnote omitted.]
>
> The Secretary points out that as early as 1940 northern peat marketers applied for, and were granted an exemption from the [FLSA]under section 7(b)(3) which exempts certain 'seasonal industries.' … [T]he fact that such an exemption was sought is strong evidence indicating that neither Congress nor the peat industry considered the agricultural exemption applicable.

Id (citing in the omitted footnote CCH Lab. Law Rep., Wages-Hrs., ¶ 25,243.73; emphasis added by this Department). The Court of Appeals noted that the language of a 1949 amendment to the FLSA made it appear that Congress had adopted this administrative interpretation and "intended that peat should not fall within the agricultural exemption." 373 F.2d at 212.

The Court of Appeals noted that in ruling to the contrary the district court had declined to follow *Georgia Peat Moss Co.* 373 F.2d at 212. Instead, the district court had relied on *Premier Peat Moss Corp. v. United States*, 147 F.Supp. 169 (S.D.N.Y. 1956) (three-judge court) (hereafter "*Premier Peat Moss.*"), *aff'd per curiam without opinion sub. nom. Interstate Commerce Comm'n v. Premier Peat Moss Corp.*, 78 S.Ct. 16 (1957), discussed below, which is also one of the two opinions on which the present taxpayer relies. The Fourth Circuit distinguished *Premier Peat Moss.* as having been decided under a different statute with different objectives than the FLSA. 373 F.2d at 212. Instead, the Court of Appeals applied the "independent productive function" analysis of *Farmers Reservoir & Irrigation* . After discussing that opinion, 373 F.2d at 212-13, the Fourth Circuit said:

> In applying this test to the instant case we are fully cognizant of the relationship of peat to agriculture but *the conduct of defendant's business is independent of any agricultural activity or farming* and we find in these circumstances support for our ultimate conclusion that there is no entitlement here to the agricultural exemption.
>
> Similarly, in McComb v. Super-A Fertilizer Works, 165 F.2d 824, [(1948)], the [United States Court of Appeals for the] First Circuit Held that employees who manufactured and packed a chemical fertilizer used in agriculture were not engaged in agriculture within the meaning of section 13(f) of the [FLSA]. This decision was expressly approved by the Supreme Court in *Farmers Reservoir*, supra, 337 U.S. 755, 69 S.Ct. 1274. After announcing the above-quoted test, Chief Justice Vinson said:
>
> > "'The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a power plant and the packer in a fertilizer factory are not employed in agriculture, even if their activity is necessary to farmers and replaces work previously done by farmers. The production of power and the manufacture of fertilizer are independent productive functions not agriculture.' [69 S.Ct. at 1278.]
>
> While peat is primarily a soil conditioner and not a fertilizer, and while it is harvested and collected rather than manufactured, the rationale of these cases is persuasive, particularly so when considered in conjunction with the stated policy of the [FLSA], the legislative history and the subsequent administrative and congressional treatment.
>
> Therefore, we hold that the company is not entitled to the benefit of the claimed exemption and must comply with the minimum wage, overtime and record-keeping requirements of the [FLSA].

Id. at 213 (emphasis added). The part of the definition of "agricultural or horticultural commodities" discussed in *Ti Ti Peat Humus* has not substantively changed, although it now includes some additional detail that is relevant for present purposes. The current definition reflects a grammatical correction, including "commodities that are planted and cultivated by man[.]" 29 CFR § 780.112 (1999). More significantly, it also states that "[t]he term does not include commodities produced by industrial techniques, *by exploitation of mineral wealth or other natural resources, or by uncultivated natural growth*. For example, peat humus or peat moss is not an agricultural commodity. *Wirtz v. Ti Ti Peat Humus Co.*, 373 F(2d) 209 (C.A.4)." *Id* (emphasis added).

3. Humans Must Cultivate Plants For Their Harvesting To Be A Usual and Normal Agricultural Pursuit.

This construction of the phrase "agricultural or horticultural commodities" in FLSA subsec. 3(f) as meaning those that are planted and cultivated by humans, and as excluding minerals, natural resources and uncultivated natural growth, is consistent with the common law of property. At common law products of the earth were divided between "crops" or "*fructus industriae*" on one hand and naturally occurring vegetation or "*fructus naturales*" on the other. "The distinction between annual crops, merely vegetable productions of the soil, raised by labor bestowed during the year, and trees, fruits and grass, which are, to a greater or less extent, of spontaneous growth, may be said to be well recognized and firmly established by the authorities." *Evans v. Hardy*, 76 Ind. 527, 532 (1881). *Lindley v. Kelly*, 42 Ind. 294 (1873) (hereafter "*Lindley*"), had previously explained this basic difference in more detail as follows:

> The distinction between the annual productions of the earth which are produced by annual planting, cultivation, and labor and such as are not, is stated with great clearness and accuracy by Mr. Chief Justice ROBERTSON, in Craddock v. Riddlesbarger, 2 Dana, [32 Ky.] 205 [(1834)], where he says: "Although such annual productions or fruits of the earth as clover, timothy, spontaneous grasses, apples, pears, peaches, cherries, etc., are considered as incidents to the land in which they are nourished, and are, therefore, not personal, nevertheless, every thing produced from the earth by annual planting, cultivation and labor, and which is therefore denominated, for the sake of contradistinction, *fructus industriae*, is deemed personal and may be sold, as personalty, even whilst growing and immature. And the purchaser of such an article in such a growing state will have the consequential right of ingress and egress, for purposes of cultivation, preservation and removal, though he will have acquired no interest in the land itself, nor any other control or dominion over it, than such as may be necessarily incident to his right to the growing *fructus*.["]

Id. at 305.

The Department has not found any statutory evidence indicating the General Assembly has ever intended to change the common law requirement that a crop arise from vegetation cultivated by humans, rather than from naturally occurring vegetation. That evidence also indicates that the

legislature intended the requirement of cultivation by humans to apply under the "farm plating" statutes and the "farm-plated vehicle" exemption from motor carrier fuel and surcharge taxes.

In 1963, the General Assembly enacted the Uniform Commercial Code (hereafter "the UCC"), ch. 317, 1963 Ind. Acts 539, now codified at IC art. 26-1. As enacted the UCC included subsection 9-109(3) (1963 Ind. Acts at 719-20, now codified as IC § 26-1-9-109(3)), which defines "farm products." That statute is part of UCC Article 9--Secured Transactions, which governs personal property and fixtures acting as collateral. IC § 26-1-9-109(3) defines "farm products" in relevant part as including "crops or livestock *used or produced in farming operations*" and requires that such goods be "in the possession of a debtor "engaged in raising, … or other *farming operations*." *Id* (emphases added). The use of this language necessarily implies that to qualify as a farm product, humans must have cultivated the vegetation constituting a putative crop.

In 1969 the General Assembly amended this definition to state that farm products are not fixtures, but otherwise left it unchanged. Ch. 72, 1969 Ind. Acts 159, 159-60. This substantial reenactment of UCC 9-109(3) occurred in the same session in which the legislature passed the predecessor of what eventually became former IC § 9-1-4-41(i). As the Department has previously noted, statutes enacted at the same session of the legislature must be interpreted harmoniously with each other. *Arnold, supra*, 193 N.E. at 848. Former IC § 9-1-4-41(i) therefore also requires that for vegetation or products of vegetation to be a crop, humans must have cultivated that vegetation.

Two statutes enacted in 1983, the same year in which IC § 6-6-4.1-2(b)(4) was enacted, indicate that the General Assembly still requires that humans cultivate crops. The first of these was P.L. 183-1983, sec. 132, 1983 Ind. Acts 1189, 1243. As discussed earlier, that statute made certain technical amendments to IC § 15-7-1-2(a), but left the substance of that subsection's definition of "agricultural [including horticultural] products," including the equating of that term with "farm products[,] *id.*, unchanged. The second statute was P.L. 186-1983, sec. 1, 1983 Ind. Acts 1252, 1252, codified at IC ch. 15-4-9 (1988 and 1993), which created a quality certification mechanism for an "agricultural product" as defined by what is now IC § 15-4-9-1. That provision defines an agricultural product as being "any plant or part of a plant or plant byproduct lawfully *grown* in Indiana." *Id* (emphasis added).

The reference to growth in IC § 15-4-9-1 and the lack of substantive change to IC § 15-7-1-2(a) indicate that the legislature has never changed Indiana common law as far as to make natural vegetation not adapted to cultivation, or its products, into farm products. Under Indiana law the terms "agricultural products," "farm products" and "horticultural products" include only a finite number of plants, plant parts or plant byproducts. Specifically, these terms include only those annual plants that had been considered *fructus industriae* at common law, those categories of *fructus naturales* that humans have adapted to cultivation, *e.g.* trees, flowers, vegetables, shrubs and perennials, and the harvestable parts and byproducts of each. They do not include categories of *fructus naturales* that humans have not adapted to cultivation, such as naturally occurring peat.

4. Harvesting Naturally Occurring Peat Is Not a Usual and Normal Agricultural Pursuit.

a. Naturally Occurring Vegetation Is an Interest in Land at Common Law.

The General Assembly has never changed the common law rule, set out in the above quotation from *Lindley*, that naturally occurring vegetation is considered to be real property because it is part of the land on which it grows. Another Indiana Supreme Court opinion makes this point more succinctly, stating that

> "[l]and comprehendeth, in its legal signification, any ground, soil, or earth whatsoever, as meadows, pastures, woods, moors, waters, *marshes*, furzes, and heath. It has also in its legal signification an indefinite extent, upwards as well as downwards." 1 Cruise Dig. 54. See 1 Inst. 4; 4 Bl. Com. 18; 3 Kent. Com. 402.

Owens v. Lewis, 46 Ind. 488, 508 (1874) (emphasis added; hereafter "*Owens*").

b. Unsevered, Naturally Occurring Peat Is A Product of Naturally Occurring Vegetation and an Interest in Land At Common Law..

As was noted in the Statement of Facts, the taxpayer's farm abuts a marsh. The relevant definition in WEBSTER'S THIRD defines a "marsh" as being "a tract of soft *wet land* **:** FEN, SWAMP, MORASS[.]" *Id.* at 1385, definition 1 (emphasis added). Peat is defined in relevant part by another English language dictionary in general use as being "a highly organic material found in marshy or damp regions composed of partially decayed *vegetable matter*[.]" RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1427 (2d ed. unabridged 1987) (emphasis added). It therefore would seem that Indiana common law would classify unsevered, naturally occurring peat, like other naturally occurring vegetation, as being land rather than personal property, *i.e.* a crop or an agricultural or horticultural product.

An early Indiana worker's compensation opinion involving coal mining on a farm, viewed in the context of the chemical and geological relationship between coal and peat, indirectly confirms this point. *Hanna v. Warren*, 133 N.E. 9 (Ind. App. 1921) (hereafter "*Hanna*"), is a pre-*Fleckles* decision in which a farmer had a surface outcropping of coal on his farm. He and two other family members contracted with a third party and entered into business among themselves to sell as much coal from this outcropping as they could deliver to that party at a local railroad switch. (With the exceptions of this and one prior, brief removal of coal from this outcropping, the farmer had never engaged in any vocation other than farming.) The sellers performed this contract by blasting coal out of this outcropping and delivering it to the switch in the farmer's wagons, but discontinued the operation after only about a month because the market price of coal fell below production costs. However, in the brief time it was active, an employee working at the coal operation was injured. That employee applied to the Industrial Board for worker's compensation and received an award, which his employers challenged in the Appellate Court. That court's summary of their principal argument, and the court's response to it, read as follows:

> Appellants contend that they are farmers, and as such are not subject to the Workmen's Compensation Laws, [citation omitted]. This contention cannot prevail. At the time of the accident and for several weeks prior thereto appellants were mining and loading coal under an agreement …. *Appellants while engaged in this work were not engaged in farm labor as that term is generally understood. They were at the time of the accident and injury to appellee engaged in the mining business*, and subject to the provisions of the Workmen's Compensation Laws[.]

Id. at 10 (emphasis added).

If mining is not farming, then under the analysis of *Fleckles* set out above mining also is not agriculture as practiced in Indiana; it does not involve "cultivating the soil, *including the planting of seed [and] the harvesting of crops[.]*" 149 N.E. at 915 (emphasis added). In other words, the farmer did nothing to the land on his farm to bring the coal in the outcropping into existence. The coal already existed as part of the land a result of a natural process, specifically the coalification process that the United States Supreme Court described just recently in *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 119 S.Ct. 1719, 1724 (U.S. 1999). As the Department understands the coalification process, it begins with peat and, if uninterrupted by humans, proceeds through lignite and bituminous coal to anthracite coal. *See* WEBSTER'S THIRD's definitions of "anthracite," "bituminous coal," "lignite" and "peat" at 92, 223, 1309 and 1662, respectively.

If coal mining is not agriculture, then neither is the extraction or severing of any naturally occurring peat from which coal may ultimately develop. If neither coal nor unsevered, naturally occurring peat is a farm product or crop, *i.e.* personal property, then by process of elimination both must be real property. The Indiana Supreme Court so held as to coal in *Cypress Creek Coal Co. v. Boonville Mining Co.*, 142 N.E. 645, 648 (Ind. 1924). An opinion from another state that is consistent with *Owens*' definition of "land" as quoted above confirms the same point as to peat. In *Clarke v. Alstores Realty Corp.*, 527 P.2d 698 (Wash. Ct. App. 1974) (hereafter "*Clarke*"), a subsidiary of the defendant corporation entered into a contract with the plaintiff to have him remove peat that was in place on a tract of real estate that the defendant owned. The contract gave the plaintiff the right to enter onto the real estate, remove peat from and stockpile peat on it for two years, and also gave the plaintiff title to any peat he removed. The corporate parent reserved the right to cancel the contract on six months' notice, but did not communicate this condition to the plaintiff until it actually gave that notice. The plaintiff refused to vacate and the corporate parent removed him and his equipment from the real estate, after which the plaintiff sued the corporate parent for breach of contract, misrepresentation and conversion of the stockpiled peat. The defendant asserted as an affirmative defense that the contract failed to comply with the content requirements of Washington's statute of frauds governing writings purporting to convey of interests in real estate, and the trial court granted the defendant summary judgment on that basis. (At the time the events of the case occurred Washington had not yet adopted the UCC, including UCC § 2-107, which now provides the test for determining whether "timber, minerals or the like," *id.*, is real or personal property. 527 P.2d at 701.)

In affirming, the Court of Appeals said :

> Although no Washington case has been brought to our attention which characterizes the sale of peat in place as the sale of an interest in realty, we agree with the trial court's ruling on the point. *The peat grew naturally upon the land, unaided by human efforts. At common law, vegetation which grew from perennial roots without the aid of human care and cultivation was regarded as 'fructus naturales,' and, while unsevered from the soil, was considered as pertaining to realty. Severe v. Gooding*, 43 Idaho 755, 254 P. 1054 (1927) (wild grass and herbage); *Webb v. Arrington*, 249 Md. 46, 238 A.2d 243 (1968) (sod) (*compare Barron v. Edwards*, 45 Mich.App. 210, 206 N.W.2d 508, 509-510 (1973) (cultivated sod, grown as a crop, treated as personalty)); *Kirkeby v. Erickson*, 90 Minn. 299, 96 N.W. [705,]705-706 (1903) (wild grass); *Sparrow v. Pond*, 49 Minn. 412, 52 N.W. 36 (1892) (blackberries); *In re Chamberlain*, 140 N.Y. 390, 35 N.E. 602 (1893) (grass).

Id (footnote omitted; emphasis added).

c. Unsevered, Naturally Occurring Peat Is Also Land For Various Statutory Purposes.

Various statutory and regulatory schemes for land use also treat unsevered, naturally occurring peat as an interest in land. For example, naturally occurring peat is considered to be an element of the value of land in some non-regulatory statutory situations. For example, *Dillenbeck v. State*, 83 N.Y.S.2d 308 (N.Y. Ct. Cl. 1948), an eminent domain opinion, holds that the existence of a peat deposit is an element of Fifth Amendment just compensation if there is a market demand for that peat. Similarly, *McMurray v. Commissioner*, 985 F.2d 36, 41 (1st Cir. 1993) held that the value of a charitable gift of a bog containing a peat deposit had to reflect state and local legal restrictions (*e.g.*, zoning legislation and the need to obtain a permit, discussed below) on the development of any possible peat extraction operation.

If one wishes to extract or sever naturally occurring peat or engage in filling operations incident to that activity, that person may be required by statute or ordinance to obtain a permit from the appropriate unit or agency of government first. Zoning ordinances of local government units are one (and perhaps the oldest) such permitting system, as illustrated in *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 959 P.2d 1024 (Wash. 1998). However, the most notable such permitting scheme affecting peat extraction is that for discharges of pollutants into the nation's navigable waters (including wetlands) under section 404 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, sec. 2, 86 Stat. 816, 884, as amended by the Clean Water Act of 1977, Pub. L. 95-217, subsecs. 67(a) and (b), 91 Stat 1566, 1600, codified as 33 U.S.C. § 1344 (1988 and 1994) (hereafter "the CWA"). Congress enacted the permitting system of CWA section 404 under its power to regulate interstate commerce under U.S.CONST. art. I, § 8, cl. 3. *E.g., United States v. Byrd*, 609 F.2d 1204, 1209-11 (7th Cir. 1979) (hereafter "*Byrd*"). The stated purpose of this system is " 'to restore and maintain the chemical, physical and biological integrity of the Nation's waters.' " 33 U.S.C. § 1251(a), quoted in *United States v. Huebner*, 752 F.2d 1235, 1239 (7th Cir. 1985) (hereafter "*Huebner*"). The permitting scheme has been interpreted as protecting the entire aquatic system of the United States. *See Byrd*, 609 F.2d at 1209-10 and 1210 n.6,

and authorities there cited. Detailed discussions of this permitting system as it affects peat extraction may be found in *Michigan Peat Div. v. U.S. Envtl. Protection Agency*, 175 F.3d 422, 423-25 (6th Cir. 1999) and *Huebner, supra*, 752 F.2d at 1239-41. These opinions indicate that Congress chose as the means to its stated end a permitting scheme to regulate the discharge of dredge and fill material from wetlands (including those on which peat naturally occurs), which feed the country's waters. The U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency (hereafter "the EPA"), and in a few jurisdictions state environmental agencies, administer this system. This scheme is similar to the traditional system adopted in local zoning ordinances permitting variances in the use of land.

Eight years after enacting the CWA, Congress also began to make federal protection available to all wetlands vulnerable to conversion to agricultural production, whether or not they are part of the nation's waters. Title XII of the Food Security Act of 1985, Pub. L. 99-198, 99 Stat. 1354, 1504 (hereafter "the FSA"), codified at 16 U.S.C. § 3801 *et seq*. (1988 and 1994), created what is popularly known as the "Swampbuster" provision, FSA § 1221, 99 Stat. at 1507, codified at 16 U.S.C. § 3821. Congress enacted Swampbuster pursuant to its spending power under U.S. CONST. art. I, § 8, cl. 1. Swampbuster therefore differs from the direct regulation of wetlands under the CWA because Swampbuster can indirectly reach additional wetlands that do not affect interstate commerce. *United States v. Dierckman*, 41 F.Supp.2d 870, 874 (S.D. Ind. 1998) (hereafter "*Dierckman I*"), *aff'd* 201 F.3d 915, 922-23 (7th Cir. 2000) (hereafter "*Dierckman II*").

"By enacting the FSA, Congress intended to 'discourage the draining and cultivation of wetland that is unsuitable for agricultural production in its natural state.' S. Rep. No. 99-145 at 303 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1969." *Dierckman II*, 201 F.3d at 917. The U.S. Department of Agriculture (hereafter "the USDA") has also administratively interpreted Swampbuster as being "designed to remove the incentive that certain benefits provided by the [USDA] could give producers … to convert wetlands for the purpose of producing an agricultural commodity." Department of Agriculture, Highly Erodible Land and Wetland Conservation, Interim Rule, 51 Fed. Reg. 23496, 23496 (1986), codified as amended at 7 C.F.R. Part 12 (1987-2000). The removal of such incentives is also the stated purpose of the USDA regulations that determine a farmer's ineligibility under Swampbuster for farm program benefits. 7 CFR § 12.1(b).

As originally enacted, Swampbuster stated that "following December 23, 1985 [the date of passage of the FSA], any person who in any crop year produces an agricultural commodity on converted wetland shall be ineligible" to participate for that year in a wide variety of federal agricultural programs. *Id* (Title 16 U.S.C. § 3801(a) defines the terms "agricultural commodity," "converted wetland," "wetland" and terms that each of these definitions in turn use.) However, experience proved the original Swampbuster to be inadequate to Congress' stated purpose. *See generally* Anthony N. Turrini, *Swampbuster: A Report From the Front*, 24 IND. L. REV. 1507 (1991). The most obvious shortcoming of the original version of Swampbuster was its scope: the disqualification was only for one year, and the statute imposed that sanction only on persons who produced agricultural commodities on converted wetland, not on persons who actually converted wetland to agricultural use.

Congress has tried to address these deficiencies by amending Swampbuster twice. The first amendment was Title XIV, § 1421(b) of the Food, Agriculture, Conservation, and Trade Act of

1990, Pub. L. 101-624, 104 Stat. 3359, 3572 (hereafter "FACTA"). Congress did so again in Title III, § 321 of the Federal Agriculture Improvement Reform Act of 1996, Pub. L. 104-127, 110 Stat. 888, 986-87 (hereafter "FAIRA"), effective July 3, 1996 by virtue of *id.* § 326, 110 Stat. at 992. These amended versions of Swampbuster were in effect for most of the taxpayer's investigation period, especially the 1990 version. As the Department will explain below, the taxpayer's description of his actions in getting prior approval from SCS to extract peat show that the taxpayer knew about and was trying to comply with these amended versions of Swampbuster. The taxpayer's actions also show that the taxpayer knew that naturally occurring peat is an interest in land rather than an "agricultural commodity," which 16 U.S.C. § 3801(a)(1) defines in relevant part as being "*planted and produced … by annual tilling of the soil, ….*" *Id* (emphasis added).

Congress in FACTA redesignated the original Swampbuster provision as 16 U.S.C. § 3821(a) and added a new subsection (b). As it read during most of the investigation period, the latter provision stated that

> any person who in any crop year beginning after November 28, 1990 [the date of passage of FACTA], converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland shall be ineligible for those payments, loans, or programs specified in subsections (a)(1) through (3) of this section for that crop year and all subsequent crop years.

16 U.S.C. § 3821(b) (Supp. II 1990 and 1994). "The more recent [FACTA] provision does not require that the person actually produce crops on the converted wetland, only that they [sic] converted the wetland for that purpose." *Dierckman I*, 41 F.Supp.2d at 872. Congress in FAIRA redesignated subsection (b) as 16 U.S.C. § 3821(c) (Supp. III 1997), changed the programs to which the ineligibility sanction attaches and relocated the revised list of programs to subsection (b). FSA § 1221 as amended by FAIRA sec. 321, 110 Stat. at 986-87. However, Congress left the language imposing the actual ineligibility sanction on converters of wetlands substantially unchanged. *Id.*

The administrative procedure for determining compliance with or exemption from Swampbuster, and farm benefit program ineligibility, that the USDA had in effect during most of the taxpayer's investigation period was codified in 7 C.F.R. Part 12 (1990-96). *Dierckman II* described that procedure as follows:

> The ineligibility determination under the Swampbuster provisions involves multiple agencies within the USDA. The *Soil Conservation* Service (SCS) determines whether a wetland or converted wetland exists on a particular farm and whether production of a crop is possible on any converted wetland. See 7 C.F.R. § 12.6(c) [(1994)]. The initial SCS determination is made by the district conservationist. The district conservationist's decision is [administratively] appealable …. After the SCS makes its technical determination regarding the existence or conversion of a wetland, another USDA agency, the Agricultural Stabilization and Conservation Agency (ASCS) [sic], determines whether any exemptions apply to the con-

> version of the wetland. See 7 C.F.R. § 12.6(b). The ASCS then determines the eligibility of any farmer who applies to the ASCS for USDA farm benefits. See 7 C.F.R. § 12.6(a). These ASCS determinations are first made by an ASCS county committee. An [administrative] appeal can be taken …. See 7 C.F.R. § 12.6(b).

201 F.3d at 918 (footnotes omitted; emphasis added). The Department of Agriculture Reorganization Act of 1994, Pub. L. 103-354, Title II, 108 Stat. 3209 (hereafter "DARA"), changed this administrative scheme to some extent. Specifically, DARA authorized the Secretary of Agriculture to create, and to reassign Swampbuster compliance responsibilities to, new agencies, and also mandated more closely coordinated enforcement of Swampbuster within USDA and with other federal wetlands programs. Section 246 of DARA, 108 Stat. at 3223-25, codified at 7 U.S.C. § 6962 (1994, corrected Supp. I 1995), authorized the Secretary to create the Natural Resources Conservation Service (hereafter "NRCS") and to transfer to it jurisdiction over Swampbuster, among other programs. *Id.* subsec. (a), 108 Stat. at 3223, codified at 7 U.S.C. § 6962(a); *id.* para. (b)(5), 108 Stat. at 3224, formerly codified at 7 U.S.C. § 6962(b)(5) (recodified by FAIRA sec. 336(d)(2)(A)(ii), 110 Stat. at 1006, as 7 U.S.C. § 6962(b)(3)), respectively. DARA section 246 also repealed the enabling legislation for SCS. *Id.* para. (f)(1), 108 Stat. at 3225, repealing former 16 U.S.C. § 590e (1988). Section 226, 108 Stat. at 3214-16, codified at 7 U.S.C. § 6932 (1994, corrected Supp. I 1995), authorized the Secretary to create the Consolidated Farm Service Agency (hereafter "CFSA" or "FSA") and gave it jurisdiction over agricultural price and income support, production adjustment and agricultural credit programs, among other functions. *Id.* subsec. (a) and paras. (b)(1) and (b)(3), respectively, all at 108 Stat. 3214, codified as 7 U.S.C. § 6932(a), (b)(1) and (b)(3), respectively. On October 20, 1994, one week after DARA became law, the Secretary created and transferred to CFSA and NRCS the respective responsibilities of ASCS for farm benefit programs and of SCS for soil and water conservation, and abolished both ASCS and SCS. Department of Agriculture, Department Reorganization Notice, 59 Fed. Reg. 66517, 66518 and 66519 (published Dec. 27, 1994), respectively. CFSA and NRCS exercised their respective duties as they affected Swampbuster, as described below, for the remainder of the taxpayer's investigation period, and continue to do so at this writing.

In addition to creating CFSA, DARA section 226 also assigned it initial jurisdiction over any administrative appeals of Swampbuster determinations, including technical (*e.g.*, wetland and wetland conversion) determinations by NRCS. *Id.* para. (d)(1), 108 Stat. at 3215, codified as 7 U.S.C. § 6932(d)(1). However, that statute further requires CFSA to coordinate review of technical determinations with NRCS and any other federal agencies with wetland responsibilities whenever required by law or any inter-agency memorandum of agreement. *Id.* para. (d)(2), 108 Stat. at 3215, codified as 7 U.S.C. § 6932(d)(2). (The memorandum to which the statute refers is the January 6, 1994 Memorandum of Agreement (hereafter "MOA") entered into among the Departments of Agriculture, the Army and the Interior, and the EPA, to coordinate administration of the CWA section 404, Swampbuster and other federal wetland laws. *See* Department of Agriculture, Highly Erodible Land and Wetland Conservation, Interim Rule, RIN 0578-AA17, 61 Fed. Reg. 47019, 47022, corrected 61 Fed. Reg. 53491 (1996), codified at 7 C.F.R. Part 12 (1997-2000) (hereafter "7 C.F.R. Interim Part 12"), which discusses the MOA.)

USDA promulgated 7 C.F.R. Interim Part 12 in part to implement FAIRA's amendments to Swampbuster and in part to "make[ ] several changes to interpret, clarify, or specify procedures

followed in the implementation for the … [wetland conservation] provisions [of the FSA, as amended]." 61 Fed. Reg. at 47021. An implied part of the latter effort was the coordination that DARA had mandated of Swampbuster and other federal wetland programs. The basic division of labor between FSA and NRCS under 7 C.F.R. Interim Part 12, which is consistent with DARA § 226(d)(1) and (d)(2) as discussed above, is set out in 7 C.F.R. § 12.6(b) and (c), respectively. The responsibilities of NRCS concerning wetlands are set out in detail in *id.* § 12.30. Paragraph (a)(8) of the latter regulation requires NRCS to give an opportunity to participate in the implementation of Swampbuster to the Army Corps of Engineers, the EPA and the U.S. Fish and Wildlife Service (an Interior Department agency; see 16 U.S.C. § 742b(b) (1994)). In addition, 7 C.F.R. § 12.30(c) requires NRCS to agree to procedures (*e.g.*, the MOA) for certifying wetland determinations and delineations with those agencies. DARA § 226(d) and 7 C.F.R. Interim Part 12 thus lead the Department to infer that the federal government has intended since at least 1994 to consistently treat peat occurring naturally on wetlands as exactly that, *wet land* as indicated in the definition of "marsh" from WEBSTER'S THIRD quoted above.

The taxpayer's explanation at the protest hearing of the legal prerequisites to entitlement to extract peat from under the farm shows a clear working knowledge of and sensitivity to federal policy concerning wetland, and in particular to the consequences of conversion of wetland by a farmer. Before beginning to extract peat from under any part of the farm, the taxpayer always obtained the prior consent of the former SCS (now NRCS). The taxpayer, in addition to referring to Wetlands (W), also mentioned Prior Converted Wetlands (PC), Minimal Effect Wetlands (MW), and Farmed Wetlands (FW), and said that he could extract peat only from fields that the SCS had identified as being MW or PC. Either Swampbuster itself or the regulations now used to administer it exempt all three of the latter classifications of wetlands from the benefits ineligibility ban. The PC and MW exemptions have existed since Swampbuster was first enacted. 16 U.S.C. § 3822(b)(1)(A); FSA § 1222(c), 99 Stat. at 1508, originally codified as 16 U.S.C. § 3822(c), recodified as *id.* (f)(1) (Supp. II 1990) by FACTA sec. 1422, 104 Stat. at 3574, respectively. USDA added the FW exemption in 7 C.F.R. Interim Part 12. *See id.* §§ 12.2 and 12.5(b)(1)(iii), which respectively define and give a limited exemption to farmed wetland. The taxpayer also recognized the need for a permit from the Corps of Engineers (*i.e.*, under CWA section 404) to extract peat from wetlands and farmed wetlands.

In short, the taxpayer's explanation indicates that the taxpayer understood, at least for purposes of Swampbuster and the CWA, that the naturally occurring peat under the farm was not an agricultural commodity as defined in 16 U.S.C. § 3801(a)(1), but a component of wetland. If nothing else, the taxpayer's pains to get the approval of the former *Soil Conservation* Service before severing the peat, to remain eligible for federal farm program benefits, would have put the taxpayer on actual notice of the legal status of that peat. The current claim that it was an agricultural or farm commodity is thus inconsistent with the taxpayer's earlier actions and what the taxpayer learned, or should have learned, from those actions.

d. Some Statutes Treat Unsevered, Naturally Occurring Peat As If It Were A Mineral.

Whether unsevered, naturally occurring peat is legally treated as being not just land, but also a mineral, and its extraction or severance as being mining or quarrying, depends to some extent on the statutory or other legal context in which the question arises. *United States v. Toole,* 224 F.

Supp. 440 (D. Mont. 1963) (hereafter "*Toole*"), the other opinion on which the taxpayer relies, held that purported placer claims that certain individuals had filed for a peat bog in a national forest were invalid. The specific issue, *id.* at 443, was whether peat was a "valuable mineral deposit[ ]" as that phrase is used in 30 U.S.C. § 22, which authorizes the exploration, occupation and purchase of federal lands on which such deposits exist. The court quoted *Premier Peat Moss* for the propositions that peat is vegetable in origin and that its transformation into coal had not progressed far enough for peat to be considered a mineral. 224 F. Supp. at 446, quoting 147 F. Supp. at 174. After analyzing other authorities, the district court in *Toole* held that peat was not a valuable mineral deposit because it was not a locatable and purchasable mineral under the general federal mining statutes. 224 F. Supp. at 449.

Whether the district court's rationale in *Toole* was a correct interpretation of 30 U.S.C. § 22 in particular, that rationale appears to the Department to have been at least questionable under federal mining law in general, both as it existed at the time and today. Title 30 U.S.C. § 3, which except for a technical amendment in 1992 was last amended in 1913, states that the former United States Bureau of Mines of the Department of the Interior has the duties, among others,

> to investigate explosives and peat; *and on behalf of the Government to investigate the mineral fuels and unfinished mineral products belonging to, or for the use of, the United States, with a view to their most efficient mining, preparation, treatment, and use*; and to disseminate information concerning these subjects in such manner as will best carry out the purposes of the provisions of [other specified] sections … of this title[.]

Id (emphasis added). Pursuant to these statutory mandates to investigate and disseminate information concerning peat, the Bureau of Mines at the time of *Toole* published information on peat. This information appeared, among other places, in an annual publication entitled the "*MINERALS* YEAR BOOK." (Emphasis added). (This publication continues to be issued to the present day. The United States Bureau of Mines did so until its elimination in federal fiscal year 1996, at which time the United States Geological Survey succeeded to this responsibility.

The district court in *Toole* held that neither 30 U.S.C. § 3 nor the government's publishing activities concerning peat were enough to justify classifying it as a mineral. 224 F. Supp. at 448-49. However, the court's quotation of the statute, *id.* at 448, stopped after the word "peat" and omitted the language following it emphasized above, leaving its quotation and analysis of the statute incomplete. It is arguable that, whatever the specific legal status of peat on national forest lands might be, for purposes of the general mining laws it is a "mineral fuel[or] unfinished mineral product[ ]" as 30 U.S.C. § 3 uses these terms. The statute certainly is open to this interpretation, given that peat historically has been used as fuel and that, as the district court in *Toole* recognized, the formation of peat is the first step in the coalification process.

Implicit in the preceding discussion is the fact that opinions like *Toole* are issued to interpret laws affecting mineral rights on federal lands, usually in the West, that the government was either trying to get settlers to homestead or that it chose to keep for itself. *See generally Southern Ute Indian Tribe*, 119 S.Ct. at 1722-23 and *Watt v. Western Nuclear, Inc.*, 103 S.Ct. 2218, 2220-

21 and 2225-27 (U.S. 1983) (hereafter "*Western Nuclear*"), which discuss the history of that legislation. Those statutes "may be a matter of considerable importance in the semiarid lands of the West, but [they are] of much less importance to the rest of the Nation." *Western Nuclear*, 103 S.Ct. at 2238 (1983) (Stevens, J., dissenting).Aside from being enacted to deal with a specific problem in a specific geographic area, these statutes provide no guidance in this protest (with the possible exception of 30 U.S.C. § 3, as explained above) for the additional reason that Congress enacted them in the late nineteenth and early twentieth centuries. For example, the statute in issue in *Western Nuclear* was passed in 1916, while those involved in *Southern Ute Indian Tribe* were enacted in 1909 and 1910. The statute specifically at issue in *Toole*, 30 U.S.C. § 22, was passed in 1872. Ch. 152, § 1, 17 Stat. 91. These statutes therefore do not necessarily reflect whether a given substance would be considered a "mineral" under the modern popular (as distinguished from scientific) definition of that word. As the Department will explain below, the commonly accepted meaning of "mineral" has expanded in modern times. Thus, 30 U.S.C. § 22 does not reflect one of the definitions of that word that had come into contemporary use by the time that the General Assembly enacted the "farm plating" statute in 1969. For these reasons, the Department believes that *Toole* does not state a generally applicable rule of law. Opinions such as *Toole* and *Western Nuclear* are valid authority only in the specific legal and factual (including geographical) contexts in which they arose.

In contrast to the limited statutory systems at issue in *Toole* and *Western Nuclear*, federal agencies charged with administering laws of general applicability throughout the country treat peat as being a mineral, or at least as being mineral-like, and its extraction as being mining. For example, the Department of Labor today classifies peat and peat humus extraction activities of the kinds at issue in *Ti Ti Peat Humus* and this protest as being not agriculture, but "Mining and Quarrying of [Miscellaneous] Nonmetallic Minerals, Except Fuel." Standard Industrial Classification Manual, Industry Group 1499 (1987).

e. Unsevered, Naturally Occurring Peat Is Depletable.

In addition, the Internal Revenue Code (hereafter "the Code") and Treasury Regulations treat unsevered, naturally occurring peat, like coal, as being a natural deposit or mineral and grant a depletion allowance of five percent of the gross income from the peat, excluding rents or royalties paid in respect of it. I.R.C. §§ 611(a) and 613(a) and (b)(6) (1988 and 1994); 26 C.F.R. (Treas. Reg.) § 1.613-2(a)(1)(v) (1961-99). *A. Duda & Sons, Inc. v. United States*, 560 F.2d 669 (5th Cir. 1977), discusses the history of the peat depletion allowance. This opinion documents that the IRS, its administrative predecessors in interest, and Congress have considered peat to be a depletable natural deposit since at least 1918, if not from the inception of the modern federal income tax. *Id.* at 674-75. The IRS promulgated the depletion regulations on peat currently in effect in 1960. T.D. 6446, 1960-1 C.B. 208, 25 Fed. Reg. 482 (1960). The promulgated regulations included all substances depletable under I.R.C. § 613 and the regulations promulgated thereunder in its definition of "minerals," and implemented the statutory five-percent depletion allowance for peat. *Id.*, 1960-1 C.B. at 213 and 231, 25 Fed. Reg. at 483 and 490, now codified as Treas. Reg. §§ 1.611-1(d)(5) and 1.613-2(a)(1)(v), respectively. (This inclusion of peat in the regulatory definition of "minerals" was consistent with one contemporary understanding of that word. WEBSTER'S THIRD defines "mineral" in relevant part as being "any of various naturally occurring homogeneous or apparently homogeneous and usu[ally] but not necessarily solid sub-

stances (as ore, coal, … [and] *peat, … .*" *Id.* at 1437, definition 1 b (emphasis added)). The General Assembly is presumed to have been aware of the law on depletion, as well as the IRS' promulgation in 1960 of the regulations concerning peat, when in 1963, only three years later, it passed the Adjusted Gross Income Tax Act (hereafter "the AGIT Act"). Ch. 32 (Spec. Sess.), 1963 Ind. Acts 82, codified as IC chs. 6-3-1 to -7 (1988 and 1993).

G. NATURALLY OCCURRING PEAT, OR OTHER NATURALLY OCCURRING VEGETATION, IS NOT AN AGRICULTURAL OR FARM PRODUCT UNDER THE "FARM PLATING" STATUTES OR THE MOTOR CARRIER FUEL TAX LAW.

1. The Legislature Has Never Changed the Legal Status of Naturally Occurring Peat.

Given this reliance on federal income tax law, the Department finds it unlikely that the General Assembly intended to deprive peat, or any other depletable substance, of its longstanding eligibility for the depletion allowance for state income tax purposes when it passed the AGIT Act. Moreover, as previously discussed above, the legislature has declined on three different occasions to change the common law status of naturally occurring vegetation not adapted to cultivation, including naturally occurring peat, from real to personal property, *i.e.* crops or farm products. It did not do so earlier in 1963 when it enacted the UCC, in 1969 when it enacted the forerunner of former IC § 9-1-4-41(i) and current IC § 9-29-5-13(b), or in 1983 when it added IC § 6-6-4.1-2(b)(4) to the Motor Carrier Fuel Tax Law. Thus, as previously discussed, the General Assembly has not changed the status of such vegetation as being land under Indiana's common law. In addition, the legislature is presumed to have been aware of *Ti Ti Peat Humus* and *Hanna* when it first enacted the modern farm plating statute. In light of this circumstance and the foregoing legislative record, the Department cannot reasonably interpret either that statute or IC § 6-6-4.1-2(b)(4) as making naturally occurring peat or any other depletable mineral, natural deposit or naturally occurring timber, an agricultural, horticultural or farm product. To interpret these statutes to the contrary would obliterate the distinction between agriculture on one hand, and mining, quarrying or lumbering (as distinguished from forestry) on the other. Such a result would not affect just the relatively limited number of farmer taxpayers in Indiana with natural deposits of peat on their farms. It would also affect a much larger group of farmer taxpayers, mostly located in southern and western Indiana, whose farms include substantial deposits of coal or other depletable minerals, natural deposits or timber.

2. The Court Opinions On Peat That the Taxpayer Has Cited Are Not on Point.

The two opinions that the taxpayer has cited to the Department concerning peat are not persuasive. The Department has already discussed one of these opinions, *Toole,* in detail above and incorporates that discussion by reference as though fully set out here. However, the Department would further observe at this point that the taxpayer, by citing *Toole*, is implying that if peat is not a mineral, it must be an agricultural, farm or horticultural product. Even if *Toole* applied to this protest (a proposition which the Department has already denied), the taxpayer's implied conclusion would not follow.

Nor does *Premier Peat Moss.*, the other opinion on which the taxpayer relies, convince the Department that naturally occurring peat is an agricultural, horticultural or farm product. That

opinion did hold that peat moss fell within the exemption for motor vehicles carrying "agricultural (including horticultural) commodities (not including manufactured products thereof)" in the Motor Carrier Act of 1935 (Interstate Commerce Act, Title II), 49 Stat. 543. *Id.*, paragraph 203(b)(6), 49 Stat. at 545, then codified as amended at 49 U.S.C. § 303(b)(6) (1952), now recodified as further amended at 49 U.S.C. § 13506(a)(6) (1994). The Department that the taxpayer's certification or exemption from certification as a common or contract motor carrier is not at issue in this protest. That body of law thus provides at best analogous, rather than direct, authority for resolving the present issue. With that said, the Department believes that *Premier Peat Moss* does not support the taxpayer's position in the present protest for several reasons.

First, the district court in *Premier Peat Moss* made its holding notwithstanding the fact that it recognized that peat moss is a "product of nature[.]" 147 F. Supp. at 172. The court did not discuss the status of such unsevered naturally occurring vegetation as being *fructus naturales* and an interest in land, rather than a crop and personal property, under the common law of the United States (including Indiana). The fact that the peat forming the subject of *Premier Peat Moss* was imported rather than domestic explains this glaring omission. Given that circumstance, the parties had little incentive to argue, and the district court little incentive to discuss, the issue carefully. Had the peat been domestic instead, the district court's analysis of this subject might have been more thorough and it might have reached a different conclusion.

Second, if the plaintiffs had been peat extractors hauling that peat in interstate commerce, they would have been subject to a different exemption that had developed prior to *Premier Peat Moss.* Paragraph 203(a)(17) of the Motor Carrier Act of 1935, 49 Stat. at 545, formerly codified at 49 U.S.C. § 303(a)(17) (1976) and id. § 10102(16) (1994) (repealed 1995), defined the term "private carrier of property by motor vehicle" as being

> any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

Id. Federal tribunals construing this definition had held well before *Premier Peat Moss* that private carriers did not need a certificate or permit from the former Interstate Commerce Commission (hereafter "the ICC") to operate in interstate or foreign commerce. *E.g., ICC v. Tank Car Oil Corp.*, 151 F.2d 834 (5th Cir. 1945). The leading pre-*Premier Peat Moss* opinion on this subject was *Lenoir Chair Co.*, 51 M.C.C. 75 (1949), *aff'd sub nom. Brooks Transportation Co. v. United States*, 93 F. Supp. 517 (E.D. Va. 1950) (three-judge court), *aff'd without opinion at* 71 S.Ct. 501 (1951) (hereafter "*Lenoir Chair*"). *Lenoir Chair* had held that there was no need to obtain ICC authorization if " 'the *primary business* of an operator is found to be manufacturing or some other noncarrier *commercial enterprise*, ….' " 51 M.C.C. at 75 (emphases added), quoted in *Red Ball Motor Freight, Inc. v. Shannon*, 84 S.Ct. 1260, 1262 (U.S. 1964) (hereafter "*Red Ball Motor Freight*"). As a result of *Lenoir Chair* the test for entitlement to this exemption became known as the "primary business" test. If the plaintiffs in *Premier Peat Moss* had been

engaged in the primary business of peat extraction and were hauling that peat in interstate or foreign commerce incident to their respective operations, paragraph 203(a)(17) rather than paragraph 203(b)(6) of the Motor Carrier Act would have applied. The district court instead would have applied the "primary business" test to the plaintiffs' respective operations, and granted the "private carrier" exemption to the transportation of their peat, as these opinions had developed that test and exemption up to that time.

Third, the facts of *Premier Peat Moss* and the motor carrier authority exemption applicable as a result, differ from the facts of this protest and the exemption that would be applicable if the taxpayer had been acting as a farmer concerning the peat. Unlike the taxpayer, the plaintiffs in *Premier Peat Moss* were contract carriers. The exemption applicable in *Premier Peat Moss* used general language; it referred to "agricultural (including horticultural) commodities (not including manufactured products thereof)[.]" 49 U.S.C. § 303(b)(6) (1952). However, in contrast to the plaintiffs in *Premier Peat Moss*., the taxpayer has claimed throughout this protest to be acting as a farmer concerning the peat deliveries. Assuming without admitting that the taxpayer was acting as a farmer for purposes of this discussion, the taxpayer would have been eligible for the separate exemption from intrastate motor carrier regulation for farmers (hereafter "the farmer's intrastate authority exemption"). This exemption was codified during the investigation period at IC § 8-2.1-18-3 (Supps. 1989-92 and 1993) and IC § 8-2.1-24-3(4)(A) (Supp. 1995). As it has read since 1989, the statute exempts motor vehicles "controlled and operated by any farmer when used in the transportation of the farmer's agricultural commodities *and products of those commodities* or in the *transportation of supplies to the farm*[.]" P.L. 99-1989, sec. 9, 1989 Ind. Acts 1012, 1023 (emphases added). The Department's research shows that it is modeled on paragraph 203(b)(4a) of the Motor Carrier Act of 1935, 49 Stat. at 545 (currently recodified as amended at 49 U.S.C. § 13506(a)(4)). As originally enacted, that paragraph exempted "motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural commodities *and products thereof*, or in the transportation of *supplies* to his farm[.]" 49 Stat. at 545 (emphases added).

A direct comparison reveals that the language of the farmer's intrastate authority exemption is substantially narrower and more specific than that of the paragraph 203(b)(6) exemption at issue in *Premier Peat Moss.* Unlike the latter statute, the farmers' intrastate authority exemption draws an explicit distinction between "agricultural commodities *and products of those commodities*" on one hand and "*supplies [transported] to the farm*" on the other. IC § 8-2.1-18-3 (Supps. 1989-92 and 1993) and IC § 8-2.1-24-3(4)(A) (Supp. 1995). The reference to "supplies" suggests the farmer must transport them for use at the beginning of, or during, the farmer's own agricultural production process. Thus, under either exemption the carrier would be entitled to haul peat for use at some time thereafter in a farming or horticultural operation. However, if the carrier were also a farmer or horticulturist, the peat would have to be intended for use in that farmer or horticulturist's own operation for the farmer's intrastate authority exemption to apply.

In contrast, the reference to "products" implies the transportation of both the commodities from which the products derive and the products themselves occurs at the end, rather than the beginning of, or during, the agricultural production process. It further implies that the farmer transporting those commodities or products must have done something in the farmer's operation, either directly or indirectly (*e.g.* cultivation), to bring the cargo into existence. By contrast, a

farmer hauling naturally occurring peat to sell to a non-farmer has done nothing in the farmer's own operation to cultivate the peat being hauled. A farmer in the taxpayer's situation would not be entitled to claim the intrastate authority exemption, even if the peat were ultimately intended for resale to some other farm or horticultural operation. That exemption is thus more restrictive than that at issue in *Premier Peat Moss.*, and as a result that opinion would not be applicable if this were a motor carrier authority case.

Fourth, unlike the exemption in *Premier Peat Moss*, but like the farmer's intrastate authority exemption, entitlement to farm plates in Indiana depends on whether or not the entity causing the motor vehicle to be operated is using that vehicle incident to agriculture. As previously discussed above, the Department interprets the noun phrase "agricultural pursuits" in the farm plating statutes in the sense of agricultural work or labor. It also interprets that phrase, as modified by the adjectival phrase "usual and normal to the [farm motor vehicle] user's farming operation," consistently with the "independent productive function" test set out in *Farmers Reservoir & Irrigation*. and *Ryan*. The motor vehicle in question therefore must be operated, and the fuel in that vehicle must be consumed, in work or labor that is part of the farmer's operation or vocation for that vehicle and fuel to be respectively entitled to Indiana farm plates and the farm exemption from motor carrier fuel and surcharge taxes. To repeat an earlier quotation from *Farmers Reservoir & Irrigation*, "the conclusion that [a type of] work *is necessary* to agricultural [including horticultural] production does not require [saying] that it *is* agricultural [or horticultural] production." *Id.*, 69 S.Ct. at 1277 (emphases in original). Specifically, the fact that naturally occurring peat is extracted or severed *for use in* agriculture (including horticulture) does not *make* that activity agriculture or horticulture, or the severed peat a cultivated agricultural or farm product. The farmer must have done something to cultivate the vegetation constituting the cargo. This is exactly the conclusion that *Ti Ti Peat Humus.* reached under *Farmers Reservoir & Irrigation* and FLSA, subsection 3(f), which similarly requires human work or labor, specifically "*cultivation, growing, and harvesting*" of the commodity for it to be agricultural or horticultural. *Id* (emphases added). It is thus the holding of *Ti Ti Peat Humus.*, and not that of *Premier Peat Moss*, that is more consistent with the "farm plating" statutes, and IC § 6-6-4.1-2(b)(4) and 45 IAC § 13-2-2(5) as well.

3. A Farmer Must Have Cultivated the Plants From Which a Motor Vehicle's Cargo Is Derived For Transportation Of That Cargo To Be A Usual and Normal Agricultural Pursuit.

The Department must administer the Motor Carrier Fuel Tax Law and the Surcharge Tax Act in light of Indiana common law, and consistent with the AGIT Act so as to produce a harmonious taxation scheme. The Department therefore construes IC § 6-6-4.1-2(b)(4) and 45 IAC § 13-2-2(5) to require a farmer causing deliveries of cargo of, or derived from, vegetation to the first point of sale in motor vehicles eligible for farm plating to have cultivated that vegetation in a farming operation. Such cargoes would fit the definitions of "agricultural product" or "farm product" as the law has come to understand those terms. Its deliveries to the first point of sale would be "agricultural pursuit[s] usual and normal to the user's farm operation." By extension, the fuel consumed in such deliveries would be exempt from the motor carrier fuel and surcharge taxes by virtue of IC § 6-6-4.1-2(b)(4) and 45 IAC § 13-2-2(5).

4. Whether Transporting A Cargo Derived From Naturally Occurring Vegetation Is A Usual and Normal Agricultural Pursuit Depends on the Purpose of the Transportation.

However, the result may differ if the cargo is or derives from uncultivated vegetation or timber, or is a deposit, that occurs naturally on the farm from which it came. Such a deposit, and such vegetation or timber, would be either an interest in land under Indiana common law, depletable under the Code, or both. If that is the case, then the entitlement to the exemption would depend on the purpose for the extraction or severance. For example, a farmer's purpose for doing so may be to use a natural deposit on the farm in furtherance of the farming operation. Examples of such use would include gravel for a service road or water for irrigation. *See Western Nuclear*, 103 S.Ct. at 2228 n.14 and cases there cited and *Mumma Bros. Drilling Co. v. Department of Revenue*, 411 N.E.2d 676, 677-78 (Ind. Ct. App. 1980) (gravel and water, respectively). Another purpose would be to conserve existing farmland. (*Compare* I.R.C. § 175, which allows farm taxpayers to deduct soil or water conservation expenses incurred in connection with land used in farming.) If the farmer can prove such a purpose, then fuel consumed by a motor vehicle eligible for farm plating that transported such a cargo on Indiana public highways incident to such activity would be "usual and normal to the [farm motor vehicle] user's operation" and tax exempt. If, however, the purpose is to bring previously unfarmed land into cultivation or pasturage, then the consumption would not be "usual and normal" and the fuel consumed incident to that activity would be taxable. *Cf.* 40 C.F.R. § 232.3(c)(1) (1988-99) and *Huggett v. Department of Natural Resources*, 590 N.W.2d 747, 751 (Mich. Ct. App. 1998) *cause cont'd* -- N.W.2d --, Table No. 113463 (Mich., Jul. 5, 2000) which respectively state that the farming exemptions from the CWA and Michigan's Wetlands Protection Act do not apply to activities necessary to create new farmland. (The process of reclaiming wetland containing peat in particular is coincidentally known as "sur charging." *Molargik v. West Enters., Inc.*, 605 N.E.2d 1197, 1198 (Ind. Ct. App. 1993) Thus, fuel consumed in hauling peat incident to sur charging would be, appropriately, subject to surcharge tax.) Lastly, if the farmer's purpose is to generate a source of regular income in addition to that of the farm operation, the deliveries of the severed vegetation, timber or deposit to the point of sale also are not "usual and normal" to that operation. Instead, those activities would constitute a prohibited independent "commercial enterprise" and the exemption would be unavailable. The motor vehicles would be "commercial motor vehicles" if they otherwise meet the requirements of IC §§ 6-6-4.1-1(b) and -2(a), and the fuel consumed in making the deliveries would be taxable.

G. APPLICATION OF ANALYSIS TO TAXPAYER'S PROTEST

The requirement that an "agricultural pursuit" be "usual and normal to the [farm vehicle] user's farming operation" (hereafter the "usual and normal" test) is the key to deciding this protest. If the raw peat extraction and delivery work was performed as part of the taxpayer's agricultural vocation, then that work would have been usual and normal to the taxpayer's farm operation, and thus "agricultural pursuits" under the "farm plating" statutes. The trucks used to deliver that peat therefore would have qualified for farm plating; by definition, they would not have been "commercial motor vehicles" for purposes of the Motor Carrier Fuel Tax Law and the Surcharge Tax Act. By extension, the taxpayer would not have been a "carrier" subject to the Surcharge Tax Act.

However, if the peat operation was economically independent of the taxpayer's farm operation, even if necessary to "agriculture," then the deliveries of that peat were not agricultural work "usual and normal" to that operation. If the latter situation is the case, then the taxpayer was engaged in a "commercial enterprise" as former IC § 9-1-4-41(i), current IC § 9-29-5-13(c) and 45 IAC § 13-2-2(5)(C) use that term. The trucks the taxpayer used to deliver the peat would no longer have been "qualified to be registered and used as" farm trucks, in violation of IC § 6-6-4.1-2(b)(4) as interpreted in 45 IAC § 13-2-2(5)(A), when the taxpayer began to use them in that enterprise. At that point they would have become "commercial motor vehicles." The taxpayer would have become a "carrier" and those trucks' fuel consumption subject to motor carrier fuel surtax.

The present taxpayer is in the same legal position as the employer was in *Ti Ti Peat Humus.* Both the taxpayer and the employer were engaged in peat extraction activities. The taxpayer did not create the bog out of which the peat under the taxpayer's farm came, and did not cultivate any plants to add to that marsh until *after* completing the extraction of the peat from under a given parcel of that farm. The taxpayer admitted at the protest hearing that the peat under his farm, like that forming the subject of *Ti Ti Peat Humus*, occurred naturally. His use of a disker to reach the peat did not constitute cultivation of the soil; diskers are commonly used in the extraction of reed-sedge peat such as that involved in this protest. RAYMOND L. CANTRELL, U.S. DEP'T OF THE INTERIOR, BUREAU OF MINES, MINERALS YEARBOOK VOLUME I, METALS AND MINERALS: PEAT, 833, 836 (1990). .More importantly, the taxpayer planted no seed incident to the extraction, the planting of seed being a key component of the legal definition of "agriculture" in Indiana. *Fleckles*, 149 N.E. at 915. That peat therefore was not an agricultural or horticultural crop or product, contrary to the taxpayer's present contention. Moreover, the taxpayer's conscientious efforts to comply with Swampbuster during the investigation period indicate that the taxpayer recognized that the peat was not an "agricultural commodity" as Swampbuster defines that term. Instead, the peat was an interest in land under Indiana common law, and was also depletable under I.R.C. §§ 611(a) and 613(a) and (b)(6) and Treas. Reg. § 1.613-2(a)(1)(v) for income tax purposes.

The taxpayer also admitted that he did not and does not use the peat he extracts to use on his own farm to grow any horticultural crops and that peat cannot be used to grow any other agricultural crops. Nor is there any evidence before the Department that the taxpayer engaged in his peat extraction and delivery activities for soil conservation reasons. For that matter, there is no evidence that the taxpayer engaged in those activities for any reason other than to generate a source of regular income in addition to that which his farm operation provided. In this connection, the Department notes that the taxpayer's farm is located in a county in Indiana that the federal government has recognized as being one of those in which for-profit peat extraction and severance activities take place. WANDA J. WEST, U.S. DEP'T OF THE INTERIOR, BUREAU OF MINES, MINERALS YEARBOOK VOLUME II, AREA REPORTS: DOMESTIC, THE MINERAL INDUSTRY OF INDIANA 187, 188 (1990).

It follows from the foregoing facts that the deliveries of that peat incident to its sale to the local processing plant were not "agricultural pursuits usual and normal to [the taxpayer's] farm operation" under former IC § 9-1-4-41(i) and current IC § 9-29-5-13(b). Instead, the farm-plated trucks making those deliveries were being "operated either part-time or incidentally in the con-

duct of a commercial enterprise" in violation of former IC § 9-1-4-41(i), current IC § 9-29-5-13(c) and 45 IAC § 13-2-2(5)(C). For that reason, the special fuel that those trucks consumed was not exempt under IC § 6-6-4.1-2(b)(4).

FINDING

The taxpayer's protest is denied as to this issue.

II. Motor Carrier Fuel Surcharge Tax –Imposition—"Carrier" Status

DISCUSSION

IC § 6-6-4.1-1(a) defines a "carrier" as being "a person who operates or causes to be operated a *commercial motor vehicle* on any highway in Indiana." *Id* (emphasis added). As discussed under Issue I above, the trucks that the taxpayer used to deliver his peat incident to its sale to a local processing plant no longer qualified for the "farm-plated vehicle" exemption of IC § 6-6-4.1-2(b)(4) and 45 IAC § 13-2-2(5). They were being were being "operated either part-time or incidentally in the conduct of a commercial enterprise" in violation of former IC § 9-1-4-41(i), current IC § 9-29-5-13(c) and 45 IAC § 13-2-2(5)(C), and fell within the definition of "commercial motor vehicle" in IC § 6-6-4.1-1(b). By operating those vehicles on Indiana highways, the taxpayer in turn became a "carrier" as the previous quotation of IC § 6-6-4.1-1(a) defines that word.

FINDING

The taxpayer's protest is denied as to this issue.

III. Motor Carrier Fuel Surcharge Tax—Imposition

DISCUSSION

IC § 6-6-4.1-4.5(a) imposes the surcharge tax "on the consumption of motor fuel *by a carrier* in its operations on highways in Indiana." The Department found under Issue II that the taxpayer was a carrier concerning the operation of the trucks used to deliver his peat incident to its sale to a local processing plant. All of the motor fuel consumed was subject to surcharge tax.

FINDING

The taxpayer's protest is denied as to this issue.

IV. Motor Carrier Fuel Surtax—Imposition—Estoppel Against /Waiver of Assessment

DISCUSSION

The taxpayer contends that an employee of the Indiana Department of Transportation and an employee of the Indiana State Police each advised the taxpayer during the investigation period that

he was not liable for any motor carrier fuel tax or surcharge tax. The taxpayer argues that these representations should prevent the Department from assessing him for surcharge tax.

The Department has considered and rejected this argument in connection with its ruling on the negligence penalty issue in the taxpayer's earlier special fuel tax protest. Title 45 IAC § 15-3-2(e), which was in effect throughout the taxpayer's investigation period, clearly states that "[o]ral opinions or advice will not be binding upon the Department." The regulation draws no distinction between Departmental and non-Departmental state employees. The oral opinion of two non-Departmental state employees is no substitute for a letter ruling obtained from the Department pursuant to 45 IAC § 15-3-2(d). Under that regulation such rulings, or letters of findings treated as if they were such rulings, are the only official opinions on which a taxpayer is entitled to rely concerning the tax status of an activity.

FINDING

The taxpayer's protest is denied as to this issue.

V. Penalties

DISCUSSION

The statutes governing motor carrier fuel tax and surtax penalties varied during the investigation period. The general penalty statutes of the Tax Administration Act (P.L. 61, sec. 1, 1980 Ind. Acts 660, 660, codified as amended at IC art. 6-8.1) in effect during the investigation period were IC § 6-8.1-10-2 (Supp. 1990) and IC § 6-8.1-10-2.1 (Supp. 1991 and 1993). The former statute was repealed and replaced with the latter by P.L. 1-1991, secs. 69 and 70, 1991 Ind. Acts 1, 59 and 59-61, respectively, both effective April 23, 1991 by virtue of *id.* sec. 224, 1991 Ind. Acts at 191. In addition to these two statutes, however, P.L. 60-1990, sec. 9, 1990 Ind. Acts 1508, 1513-14, added IC § 6-6-4.1-23 (Supps. 1990-91 and 1993), a penalty statute specifically applicable under the Motor Carrier Fuel Tax Law. IC § 6-6-4.1-23 took effect January 1, 1991 by virtue of P.L. 60-1990, sec. 16, 1990 Ind. Acts at 1518. Thus, IC § 6-8.1-10-2 was the only penalty statute in effect during calendar year 1990 of the investigation period. IC § 6-6-4.1-23 was in concurrent effect with IC § 6-8.1-10-2 for the period beginning January 1, 1991 and ending April 22, 1991, and with IC § 6-8.1-10-2.1 for the part of the investigation period that occurred on and after April 23, 1991.

However, the relevant substantive criteria for deciding whether the Department should impose or waive a negligence penalty on a motor carrier fuel tax or surcharge tax assessment remained constant. IC § 6-8.1-10-2(a) imposed, and IC § 6-6-4.1-23(a)(3) imposes, a penalty for "incur[ring], upon examination by the department, a deficiency … due to negligence[.]" *Id.* IC § 6-8.1-10-2.1(h) (Supp. 1991 and 1993) (now *id.*(i) (1998)) made the actions that trigger a penalty under subsection (a) of that statute, among other subsections, inapplicable to a motor carrier fuel tax return. IC § 6-6-4.1-23(a) thus became the exclusive authority controlling that subject once IC § 6-8.1-10-2.1 took effect. Because IC § 6-6-4.1-23 does not apply to the first year of the investigation period and because it has never had any provision for waiving penalties, IC §§ 6-8.1-

10-2(d) and -2.1(d) continue to govern that subject. Each imposes a standard of "reasonable cause." *Id.*

Title 45 IAC § 15-11-2(b), which defines "negligence," states in relevant part that "[i]gnorance of the listed tax laws, *rules and/or regulations* is treated as negligence." *Id* (emphasis added). When the General Assembly passed the AGIT Act in 1963 it incorporated all sections of the I.R.C. necessary to make the AGIT Act effective and made all relevant federal Treasury Regulations also regulations of this Department. Ch. 32 (Spec. Sess.), sec. 117, 1963 Ind. Acts at 85, codified as amended as IC § 6-3-1-17 (1988) and IC § 6-3-1-11(b) (1993). I.R.C. §§ 611(a) and 613(a) and (b)(6) and Treas. Reg. § 1.613-2(a)(1)(v), which govern peat depletion, were all in effect before the legislature passed the AGIT Act. The Department believes it is reasonable to infer from the taxpayer's failure to claim the peat depletion allowance that the taxpayer had actual or constructive knowledge that naturally occurring peat is an interest in land. However, assuming the taxpayer did not have such actual knowledge, his ignorance of I.R.C. §§ 611(a) and 613(a) and (b)(6) and Treas. Reg. § 1.613-2(a)(1)(v) was negligent. An awareness of those authorities would have put the taxpayer on notice that naturally occurring peat is a natural deposit in land and not a crop or agricultural or farm product. The taxpayer has not provided any evidence that would establish reasonable cause to abate the penalty.

FINDING

The taxpayer's protest is denied as to this issue.